

State Crackdown On Deceptive Ads For Drug Suits Is Welcome

By **Victor Schwartz and Cary Silverman** (June 10, 2022)

Each year, personal injury law firms and marketing companies that specialize in lead generation spend millions of dollars on thousands of ads on television, social media and websites targeting prescription drugs and medical devices. The goal of these ads is to recruit clients for mass tort lawsuits.

But some of these ads mislead and even endanger viewers, by suggesting they are communicating objective or government-approved medical information. In response, five states have enacted legislation to curb common deceptive practices in lawsuit advertising and protect public health over the past three years.

These efforts should be applauded. And with a federal appellate court's recent rejection of a First Amendment challenge to one of these laws, the way is now clear for additional states to act to curb the most harmful consequences of these ads.

Experienced medical professionals have explained how patients have died or became seriously injured because they stopped taking needed medicines after viewing shock advertising about potential personal injuries.[1]

Studies have also documented how deceptive lawsuit ads have led elderly patients to stop taking critical blood-thinning drugs,[2] at-risk teenagers to reject beneficial HIV prevention medications,[3] and women to believe that helpful medical devices had been recalled when they had not.[4]

In 2016, the American Medical Association called on legislators to require lawsuit ads to include warnings that patients should not discontinue medications without seeking the advice of their doctor.[5] In 2019, the AMA found that misleading ads had become more pervasive, and called for action by state legislatures to protect patient health.[6]

Some of these lawsuit advertisements violate ordinary principles of consumer protection that apply to other industries, yet there has been little response from government agencies or state bars.[7] The tide, however, may be turning.

Kansas legislators recently stood up for patients by passing S.B. 150, which Gov. Laura Kelly signed into law on April 18.[8] Kansas thus joined Indiana,[9] Tennessee,[10] Texas[11] and West Virginia,[12] which have passed similar laws over the past three years.

These laws focus on prohibiting common deceptive practices by entities that often sponsor the lawsuit ads, amass potential cases and sell these leads to personal injury law firms. Under these laws, lawsuit ads cannot use language that suggests the ads are sharing objective, scientific information.

Ads cannot be presented as a "medical alert" or "health alert" in an attempt to grab the attention of vulnerable individuals. In addition, ads can no longer use terms such as "recall" when referring to a medicine or medical device that has not actually been recalled.



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Under most of these laws, ads can no longer display the logo of a government agency, which may suggest a sponsorship by, or affiliation with, an agency such as the U.S. Food and Drug Administration. Further, the laws now require that ads make important disclosures to viewers, including the paid nature of the advertisement, the identity of the sponsor and who will handle potential litigation.

Perhaps most importantly, under most of the new laws, if an ad attempts to generate lawsuits related to an FDA-approved prescription drug, the ad must caution viewers not to stop taking the medicine without first consulting their doctor.[13]

There are some significant variations in these state laws. For example, the Kansas law does not apply to attorneys or law firms, and the Indiana law does not apply to Indiana-licensed attorneys, reserving their requirements for lead generators and relying on the state bar for regulation of attorneys.

Some of the laws include additional safeguards. For example, the Kansas, Tennessee and West Virginia laws prohibit using, selling or transferring an individual's protected health information without consent for the purpose of soliciting an individual for legal services.

The Texas law includes a safe harbor for ads that are reviewed and approved by the state bar. The mechanism for enforcement of these laws, and potential liability, also varies from state to state.

Members of the public who see and respond to a lawsuit ad do not necessarily realize that when they call the number in the ad, they may not be speaking to a lawyer or even someone at a law firm. Callers are typically connected to a call-center operator, sometimes located outside the U.S.[14]

The entities running these call centers are intermediaries that generate and sell leads to personal-injury law firms. These lead generators create a buffer that allows lawyers to skirt potential ethical violations with respect to orchestrating deceptive ads.

Those seeking to maintain the status quo have argued that curbs on deceptive ads violate free speech rights granted by the First Amendment. The U.S. Court of Appeals for the Fourth Circuit recently rejected such an argument by personal injury lawyers challenging West Virginia's law.

In its April 27 ruling in *Recht v. Morrissey*, the court found that the law's requirements are "just the sort of health and safety warnings that have been long considered permissible." [15]

The court found that "each prohibition targets particular misleading words or images in order to protect public health and prevent citizens from taking misguided medical actions based on attorney advice," and that the law's disclosure requirements are a "response to concrete concerns supported by empirical evidence." [16]

The Fourth Circuit concluded that "all West Virginia requires is that attorneys truthfully present themselves as attorneys." [17] The court denied a motion for rehearing en banc on May 24.

The recent efforts by states to address deceptive lawsuit advertising should be applauded, applied to both lawyers and lead generators who profit from such arrangements, and

adopted in other states. These laws will not stop mass tort lawsuit advertising, but they can curb the ads' most harmful side effects.

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[1] See, e.g., Examining Ethical Responsibilities Regarding Attorney Advertising, Hearing Before the Subcommittee on the Constitution and Civil Justice of the Committee on the Judiciary, House of Representatives, 115th Cong., 1st Sess., June 23, 2017 (testimony of Ilana Kutinsky, Director of Atrial Fibrillation Services, William Beaumont Hospital, Troy, Michigan; Dr. W. Frank Peacock, MD, FACEP, FACC, Professor, Emergency Medicine, Associate Chair and Research Director, Baylor College of Medicine, Houston, Texas; Shawn H. Fleming, MD, Novant Health Vascular Specialists).

[2] Mohamed Mohamoud et al., Discontinuation of Direct Oral Anticoagulants in Response to Attorney Advertisements: Data From the FDA Adverse Event Reporting System, *Annals of Pharmacotherapy*, vol. 53, issue 9, at 962-63 (Sept. 2019) (identifying, in the FDA's Adverse Event Reporting System, 66 reports of patients who discontinued their anticoagulant after viewing a lawsuit ad, usually without consulting with their doctor, and finding half of these patients reportedly experienced a stroke, seven people died and 24 people experienced other serious injuries).

[3] Pedro A. Serrano et al., Effect of Truvada Lawsuit Advertising on Preexposure Prophylaxis Attitudes and Decisions Among Sexual and Gender Minority Youth and Young Adults at Risk for HIV, *35 AIDS* 131-39 (2021) (finding, in a study of 1,500 at-risk youth and young adults who were candidates for HIV preventative medications, half of this population had seen lawsuit ads asserting that use of the drug can lead to kidney or bone injuries, and nearly one in five of those who were aware of the lawsuits attributed not initiating or stopping use of the drug to the advertisements).

[4] Christopher F. Tenggardjaja et al., Evaluation of Patients' Perceptions of Mesh Usage in Female Pelvic Medicine and Reconstructive Surgery, *85 Urology* 326, 327 (2015) (finding more than half of new patients (52%) that went to a specialty urology clinic to seek treatment for pelvic organ prolapse (POP) and stress urinary incontinence (SUI) mistakenly believed there was a recall due to TV ads recruiting individuals for lawsuits).

[5] American Medical Association, House of Delegates Resolution 208 (A-16) (2016); Am. Med. Ass'n, Attorney Ads on Drug Side Effects, Policy H-105.985 (2016).

[6] American Medical Association, House of Delegates, Resolution 222 (A-19) (2019) (calling on state legislatures to prohibit attorney advertisements that misuse governmental logos or the term "recall," provide a clear warning on the dangerous of stopping a course of

treatment without consulting a physician, and require written consent before sharing personal health information).

[7] See generally Cary Silverman, *Bad for Your Health: Lawsuit Advertising Implications and Solutions* 44-52 (U.S. Chamber of Commerce Inst. for Legal Reform, Oct. 2017); Elizabeth Tippet, *Medical Advice from Lawyers: A Content Analysis of Advertising for Drug Injury Lawsuits*, 41 *Am. J.L. & Med.* 7 (2015).

[8] S.B. 150 (Kan. 2022).

[9] H.B. 1125 (Ind. 2021) (codified at Ind. Code §§ 24-5-26.5 et seq.).

[10] S.B. 352 (Tenn. 2019) (codified at Tenn. Code §§ 47-18-5601 et seq.).

[11] S.B. 1189 (Tex. 2019) (codified at Tex. Gov't Code §§ 81.151 et seq.).

[12] S.B. 136 (W. Va. 2020) (codified at W. Va. Code Ann. §§ 47-28-1 et seq.).

[13] While the Indiana law does not explicitly prohibit the incorporation of government logos in ads or require a "consult with your doctor" cautionary statement, that state's law broadly prohibits "communications that open with sensationalized warnings or alerts that may mislead consumers to believe the consumers are watching a government sanctioned" alert, prohibits ads that leave consumers with a false impression that the risks of a drug or medical device exceed its benefits, and requires claims to be substantiated by "competent and reliable scientific or medical evidence." Ind. Code §§ 24-5-26.5-9.

[14] See, e.g., Alison Frankel, *Medical Device Defendant Probes Origin of Mesh Claims*, Reuters, March 10, 2016 (reporting that a legal marketing company contracted with call centers in countries such as India, Mexico and the Philippines from which it purchases leads for lawsuits and sold to law firms).

[15] *Recht v. Morrissey*, 32 F.4th 398, 417 (4th Cir. 2022).

[16] *Id.* at 414, 419.

[17] *Id.* at 419-20.