Plaintiff attorney advertising in pharmaceutical and medical device litigation: addressing the risk of harm to the public

Product Liability Alert

29 October 2019
By: Katie Insogna

Attorney advertising can be an important way for some types of lawyers to increase visibility and get clients. When such advertising is combined with misleading information or scare tactics, however, there is a significant risk of real harm to an unsuspecting public.

In recent years, plaintiff attorney advertising in pharmaceutical and medical device litigation has grown, and can be found on television, radio, and the Internet. Some plaintiffs' firms even utilize robocalls to contact prospective clients, inquiring about use of products subject to litigation. After concerns by key stakeholders and state action culminated in a recent public reproach by the FTC, the tide may be turning on such advertisements.

According to the American Tort Report Association, which regularly canvases media spending, in the third quarter of 2018 nearly 3 million ads for legal services aired on local broadcast networks in the 210 local media markets across the US. The total cost? $226 million! Soliciting plaintiffs is big business, because bigger inventories often are thought to return greater rewards.

But the message frequently conveyed to the public in law firms' advertising about pharmaceutical and medical

device litigation is that a medication or device is inherently dangerous and can hurt the viewer or someone she loves. For example, advertisements for lawsuits involving blood thinners warn that the products "may be linked to serious or fatal bleeding" and "may be linked to uncontrolled bleeding." But such advertising can have deadly consequences. Language like this naturally induces fear, which may lead to patients stopping their medication. In the case of blood thinners, for example, this decision could prove deadly. Some blood thinners carry a black box warning that "[p]remature discontinuation of [the medication] increases the risk of thrombotic events." In other words, when attorneys market to the public about life-saving medications, that marketing may well have the unintended consequence of impacting the public's medical decision-making − potentially to disastrous consequence. Indeed, the media has frequently repeated the FDA's statement that it has received scores of adverse event reports stemming from abrupt termination of blood thinner use, driven by these advertisements. In addition to blood thinners, many other medications require consistent daily use, and interruptions in use can have adverse consequences.

In September 2019, the Federal Trade Commission publicly announced action against "seven legal practitioners and lead generators expressing concerns that some television advertisements that solicit clients for personal injury lawsuits against drug manufacturers may be deceptive or unfair under the FTC Act."[1]

The letters reflect FTC's specific focus on advertisements that "may make deceptive or unsubstantiated claims about the risks of taking blood thinners and drugs for diabetes, acid reflux, and high blood pressure." FTC also notes that the advertisements risk confusion over the status of the medication and whether FDA has issued a recall.

The warning letters, which are each three to four pages long, list concrete criticisms of the advertisements and what about them is deceptive. For example, regarding an Invokana advertisement that claims "The FDA has just issued a warning that Invokana may cause an increased risk of amputations," the FTC stated that " the FDA has advised patients not to stop taking their diabetes medicine without first talking to their health care professional. Accordingly, the implication that FDA has warned patients to stop taking Invokana appears to be false. In addition, this ad may convey to a significant number of viewers that taking Invokana poses a substantial risk of amputations, and that the risk of taking it outweighs its benefits. Unless you have competent and reliable scientific evidence for such claims, you should not make them."

The warning letters even get into the weeds on the scientific data. In one letter, the FTC warns that "the study referenced in the ad found [the product's use] was associated with an additional 4.29 [adverse events] per 10,000 people per year, amounting to a very small, .043-percent increase in risk. Accordingly, the implication that the study establishes that prolonged use of [the medication] poses a substantial risk of [the adverse event] appears to be false."

The FTC warns the plaintiff firms "must have competent and reliable scientific evidence to substantiate their claims about these purported risks. (It would be refreshing if they had such evidence before filing the lawsuits, too.)

According to FTC's press release, the exact scenario contemplated above has already happened: "consumers who saw lawsuit ads about the prescription drugs they were taking, discontinued those medications, and suffered adverse consequences as a result." Not mentioned, but also relevant, is the negative impact such ads have on a prospective jury pool.

Stakeholders raise warning flags

The FTC action is part of a larger wave of concern over such lawyer ads. In June 2016, the American Medical Association adopted a policy recommendation that lawyer advertisements about medications "come with a warning that patients should first consult with a physician before discontinuing medications."[2] AMA board member Russell W. H. Kridel, M.D has said that "[t]he onslaught of attorney ads has the potential to frighten patients and place fear between them and their doctor. By emphasizing side effects while ignoring the benefits or the fact that the medication is FDA approved, these ads jeopardize patient care. For many patients, stopping a prescribed medication is far more dangerous, and we need to be looking out for them."

States take action

Two states have heeded the recommendation – first Tennessee and then Texas. Tennessee's law, introduced in January 2019 and effective in July 2019, formally prohibited deceptive lawyer ads. *See* Pub. Ch. 119.[3] The law sets forth a list of required and banned content in such advertisements. For example, the ad may not display the logo of a government agency, use the word "recall" if a product hasn't been recalled, or fail to disclose it is a paid advertisement for lawyers. The ad also may not represent itself as a "medical alert," "health alert," "consumer alert," or "public service announcement." Attorney ads must also include the warning: "Do not stop taking a prescribed medication without first consulting with your doctor. Discontinuing a prescribed medication without your doctor's advice can result in injury or death." Violators are subject to the penalties and remedies provided in the Tennessee Consumer Protection Act of 1977, and willful violations may be a misdemeanor.

The Texas law, introduced in February 2019 and effective in September 2019, demands the same nondeceptive content as Tennessee – including a prohibition on using the FDA logo or the word *recall* inappropriately – but is slightly more limited in scope. The Texas law applies only to television advertisements and empowers only certain government actors to bring a claim under the statute.

What to watch for

As lawyer ads about medications and medical devices receive heightened scrutiny, it will be important to monitor how other states react and whether any follow the lead of Tennessee and Texas, as well as how cases alleging violations of those laws play out in the courts (at press time, none have been located).

If plaintiffs fail to heed the warning of the FTC, we may see more warning letters issued to law firms, and those law firms may not have the benefit of anonymity next time. Perhaps such warning letters will come out in the course of pending litigation.

Regardless, it seems that regulatory bodies are finally recognizing that plaintiff attorney advertising in the pharmaceutical and medical device space has the potential to cause harm and that some guardrails are necessary to protect the public.

An earlier version of this appeared on Law360 *on October 29, 2019.*

---

1 https://www.ftc.gov/news-events/press-releases/2019/09/ftc-flags-potentially-unlawful-tv-ads-prescription-drug-lawsuits

2 https://www.ama-assn.org/press-center/press-releases/ama-adopts-new-policies-final-day-annual-meeting

3 https://publications.tnsosfiles.com/acts/111/pub/pc0119.pdf

AUTHORS

Katie Insogna
Associate
Boston | T: +1 617 406 6000
katie.insogna@dlapiper.com