



FOURTH CIRCUIT UPHOLDS WEST VIRGINIA LAW REGULATING MISLEADING DRUG AND DEVICE LAWSUIT ADS

by Mark A. Behrens and Kateland R. Jackson

The U.S. Court of Appeals for the Fourth Circuit in *Recht v. Morrissey*, 32 F. 4th 398 (4th Cir. 2022), recently upheld a 2020 West Virginia statute that regulates advertisements soliciting claimants to file lawsuits involving pharmaceuticals or medical devices. The court rejected First Amendment challenges brought by two West Virginia plaintiffs' attorneys and a client. West Virginia is one of a growing number of states that regulate misleading advertisements for legal services.¹ The *Recht* case is the first time an appellate court has decided the constitutionality of one of these laws.

Lawsuit Advertising

According to a 2020 U.S. Chamber Institute for Legal Reform (ILR) report, "Plaintiffs' lawyers, companies that specialize in advertising and gathering claims (known as 'lead generators'), and third parties that finance the litigation spend about \$1 billion on television advertising each year to seek plaintiffs for mass tort litigation." Commercials targeting manufacturers of prescription drugs and medical devices "make up the largest share of lawsuit advertising on television, and the number of ads continues to rise," according to another ILR report. The American Tort Reform Association estimates that, between 2017 and 2021, plaintiff interests "spent over \$31 million on more than 765,000 local legal services television advertisements" in West Virginia alone.

Legal services advertisements for drug or device litigations often flash attention-grabbing phrases like "consumer medical alert," "health alert," or "public health service announcement," suggesting to viewers "the advertisement is offering professional, medical or government agency advice about pharmaceuticals or medical devices rather than legal services." (*Recht*, 32 F.4th at 410). "[S]tudies indicate that consumers may indeed be confused by such advertisements and may mistake them for medical advice." (*Id.* at 418). Sometimes, the advertisement will use the term "recall" to suggest that a medication or device is unsafe, even if the product has not been recalled. Advertisements also may display a government agency logo falsely suggesting that an ad has "the sponsorship" of the government.

Misleading information and exaggerated claims made in legal services advertisements may lead patients to stop using a medication cold turkey, placing the person at great risk, including death.

For example, a 2019 study of reports filed with the FDA documented scores of patients who discontinued a prescribed blood thinner after viewing lawsuit ads, usually without consulting with their doctor. Seven of these patients died, half experienced a stroke, and two dozen experienced other serious injuries. In 2017, a physician for one of the seven deceased patients told a congressional committee that "the tone and content of these advertisements imply a qualitative judgment about these medications that are

¹ See W. Va. Code Ann. §§ 47-28-1 *et seq.* (2020); Ind. Code §§ 24-5-26.5-1 *et seq.* (2021); Tenn. Code Ann. §§ 47-18-5601 *et seq.* (2019); Tex. Gov't Code § 81.151 (2019); Kansas S.B. 150 (2022).

just not true. When you say call 1-800-BAD-DRUG, that implies it's a bad drug, which runs counter to current medical evidence and also to the FDA's recommendations."

Recognizing these dangers, the AMA passed a resolution in 2016 calling upon legislators and regulators to require attorney commercials to warn patients not to discontinue taking their medications without seeking their doctor's advice. Since then, the AMA has found these types of misleading practices "even more pervasive" and renewed its call for action to protect patient health.

West Virginia Statute Regulating Certain Legal Services Advertisements

West Virginia's Prevention of Deceptive Lawsuit Advertising and Solicitation Practices Regarding the Use of Medications Act, W. Va. Code Ann. §§ 47-28-1 *et seq.*, regulates legal advertisements soliciting claimants for pharmaceutical or medical device litigations in two ways: by prohibiting such advertisements from using certain terms or images that may mislead the public, and by requiring certain disclosures to prevent confusion and protect public health.

Legal advertisements involving medications or devices cannot be presented as a "consumer medical alert," "health alert," "consumer alert," or "public service health announcement." An ad also cannot display the logo of a government agency in a manner suggesting an affiliation with the sponsorship of that agency. In addition, the law prohibits advertisements' use of the word "recall" when referring to a pharmaceutical or medical device that has not been recalled by a government agency or through an agreement between a manufacturer and a government agency.

As to disclosures, covered advertisements must state, "This is a paid advertisement for legal services," and identify the ad's sponsor. The ad also must warn viewers not to stop taking a prescribed medication without first consulting a doctor, and that doing so "can result in injury or death." Viewers must be told the product remains FDA-approved as well unless it has been recalled or withdrawn.

Fourth Circuit's Decision Upholding the West Virginia Law

The plaintiffs in *Recht* alleged that the Act unconstitutionally restricts free speech by imposing prohibitions and requiring certain disclosures. Specifically, the plaintiffs opposed any restrictions on the terms and images permitted in legal services advertisements. They also opposed two of the law's disclosure requirements—one warning viewers not to discontinue a medication without consulting a doctor, and another that informs viewers that the subject of the ad remains FDA-approved unless the product has been recalled or withdrawn. The district court agreed and enjoined the entire law.

The Fourth Circuit reversed the district court, recognizing West Virginia's "premier duty" of "safeguard[ing] the health and safety of its citizens." According to the court, "the requirements here are just the sort of health and safety warnings that have been long considered permissible." The court reasoned that the law's prohibitions and disclosures "present no constitutional problem," explaining that the law "targets misleading speech and furthers substantial government interests in an appropriately tailored manner." The court rejected the plaintiffs' arguments as an attempt "to transfigure the Act into a sweeping and draconian enactment." The court explained, "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 Fourth Circuit remanded the case with directions that it be dismissed. The court rejected a petition by plaintiffs for rehearing en banc.