TESTIMONY OF CARY SILVERMAN, ESQ.
SHOOK, HARDY & BACON L.L.P.

ON BEHALF OF THE U.S. CHAMBER INSTITUTE FOR LEGAL REFORM IN SUPPORT OF S.B. 150

BEFORE THE KANSAS SENATE JUDICIARY COMMITTEE
FEBRUARY 16, 2021

Madam Chairwoman and Members of the Committee, thank you for the opportunity to testify in support of S.B. 150 on behalf of the U.S. Chamber Institute for Legal Reform (ILR), a division of the U.S. Chamber of Commerce. The U.S. Chamber is the world's largest business organization representing companies of all sizes across every sector of the economy. Its members range from the small businesses and local chambers of commerce that line the Main Streets of America to leading industry associations and large corporations. The U.S. Chamber is proud to count many Kansas businesses among its broad membership.

By now, you have likely become accustomed to the constant daytime and late-night advertisements for legal services. When targeting products such as medications, medical devices, or consumer products, they often begin with scary music, a dramatic voiceover, and official-sounding language declaring a "medical alert" or a "drug alert." Some are framed as public service announcements or news reports, suggesting that the ad will provide impartial health information. After catching the viewer's attention, the ad then lists a range of serious illnesses or medical conditions, attributing them to the product, which may be contrary to science, extraordinarily low risks, or fully understood by regulators and doctors. Sometimes, the official logo of the U.S. Food and Drug Administration (FDA) flashes in the background as the announcer tells viewers that the safety of the product is being investigated, a study has found the product may cause an illness, or that lawsuits against the manufacturer have resulted in multimillion dollar verdicts. The ad commonly concludes by telling viewers that if you or a loved one used the product, call "right now" because you may be entitled to substantial compensation.

It is sometimes unclear who sponsored the ad – a government agency, a health organization, or a law firm. That the ad is sponsored by a law firm or an advertising firm that specializes in generating lawsuits may be buried in fine print that momentarily flashes on the screen in a font that no one could possibly read at the end of the commercial.[1]

---

[1] These practices are thoroughly documented in a paper I authored for the U.S. Chamber Institute for Legal Reform, Bad for Your Health: Lawsuit Advertising Implications and Solutions 10-17 (Oct. 2017); *see also* Jesse King & Elizabeth Tippett, *Drug Injury Advertising*, 18 Yale J. Health Pol'y L. & Ethics (2019); Elizabeth Tippett, *Medical Advice from Lawyers: A Content Analysis of Advertising for Drug Injury Lawsuits*, 41 Am. J. L. & Med. 7 (2015).

Similar tactics are used online where websites such as "medrecallnews.com" feature photos of doctors and suggest they offer unbiased information on recalled or dangerous products, when they are disguised lawsuit referral services.

The goal of these ads is to generate as many "leads" for lawsuits as possible to fuel mass tort litigation and ultimately pressure businesses to settle cases even if the scientific consensus is that the product is safe and beneficial. Left unconstrained, these ads have serious side effects for the public. There is mounting evidence that the misleading tactics and exaggerated claims made in lawsuit advertisements that run with increasing frequency lead people to stop taking a prescribed medication without consulting a doctor or to not seek treatment. For example, a 2017 survey of patients who took one or more of twelve medications to treat conditions ranging from diabetes to depression found that one in four respondents who had taken a prescription drug would stop taking that medication immediately after they viewed an actual lawsuit ad targeting that drug.[2] An earlier survey of psychiatrists who treat patients for schizophrenia and bipolar disorder returned similar results.[3]

These concerns are not hypothetical. Plaintiffs' lawyers and lead generators spent over $100 million on ads targeting the blood thinner, Xarelto. The commercials typically began with an announcer telling viewers in a dire tone that the ad was a "Xarelto Alert," a "Xarelto Warning," a "Medical Alert," or an "important medical announcement." Lawsuit ads told viewers that Xarelto has been linked to "uncontrolled bleeding and death." Some ads went further, asserting that Xarelto caused bleeding of the brain or gastrointestinal system. Other ads stated that Xarelto may cause stroke, pulmonary embolism, and deep vein thrombosis–the very conditions against which doctors prescribe the blood thinner. Some ads displayed a multimillion dollar settlement involving a different blood thinner, while others flashed an early Xarelto verdict that was almost immediately thrown out by the court as contrary to the evidence. In sum, these misleading commercials repeatedly told patients that the anticoagulant prescribed by their doctors to prevent a stroke could kill them.[4]

The misleading television commercials had consequences for viewers who had not experienced an issue with their medication. In 2019, FDA researchers searched the FDA's

---

[2] The May 2017 poll was commissioned by the U.S. Chamber Institute for Legal Reform and conducted by one of the nation's leading public opinion research firms. It included an online survey of 1,335 adults, 500 of whom were currently taking, or had taken, one or more of twelve prescription drugs frequently targeted in lawsuits. The survey results are available in Bad for Your Health: Lawsuit Advertising Implications and Solutions, *supra*, at 20-22.

[3] National Council for Community Behavioral Healthcare, Press Release, *New Survey Shows Product Liability Litigation May Jeopardize Treatment Outcomes for People with Severe Mental Illness*, June 13, 2007 (finding 97% of 400 surveyed psychiatrists had patients who stopped taking medication or reduced their dosage and more than half of the psychiatrists believed that patients took these actions due to lawsuit ads.

[4] Given the number of people taking Xarelto and the understood bleeding risk, the ads generated over 30,000 lawsuits. Although plaintiffs did not prevail in a single case, the manufacturer agreed to settle the claims.

Adverse Event Reporting System (AERS) and identified 66 reports of patients who discontinued their anticoagulant after viewing a lawsuit ad, usually without consulting with their doctor.[5] Half of these patients experienced a stroke, seven people died, and 24 people experienced other serious injuries. Most of the victims were senior citizens. These figures likely significantly understate the number of injuries and deaths, as few doctors, patients, or their families may think to report attorney advertisements to the FDA or even be aware that an ad sparked a patient's decision to stop taking his or her medication.

Doctors have also given disturbing first-hand accounts of patients who have died, experienced serious injuries, or placed themselves at considerable risk because they stopped taking their medication after viewing a misleading lawsuit ad.[6]

The American Medical Association (AMA) recognized the danger of these misleading ads five years ago, when it first passed a resolution calling upon legislators to require attorney commercials to have appropriate warnings that patients should not discontinue medications without seeking the advice of their physician.[7] Since then, the AMA has found that these types of misleading practices have become "even more pervasive" and renewed its call for action to protect patient health.[8]

The proposed legislation, S.B. 150, does just that. It narrowly targets the specific types of deceptive practices that are commonly employed in lawsuit ads. The bill requires legal advertisements to contain three simple disclosures. First, an ad must disclose at the outset that it is a paid advertisement for legal services. Second, an ad must indicate the identity of the attorney, law firm, or other sponsor of the advertisement. Third, if the ad is soliciting clients for lawsuits targeting an FDA-approved prescription drug, the ad must warn viewers to not stop taking a prescribed medication without first consulting with a doctor.

---

[5] 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). That study included reports filed through November 15, 2017, covering the peak of Xarelto lawsuit advertising. The reports mostly involved patients discontinuing the use of Xarelto, though there were also reports stemming from lawsuit ads targeting other new anticoagulants, Pradaxa and Elloquis.

[6] *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).

[7] 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).

[8] American Medical Association, House of Delegates, Resolution 222 (A-19) (2019).

S.B. 150 also prohibits three of the most common, deceptive lawsuit advertising practices. These are practices that if used by any other type of business, would likely result in government enforcement actions and class action lawsuits. They include:

- Prohibiting an ad from being presented as a "medical alert," "health alert," "consumer alert," or "public service announcement," which it is not.

- Prohibiting an ad from displaying the logo of a government agency in a manner suggests the ad is affiliated or sponsored by that agency.

- Prohibiting use of the term "recall" in lawsuit ads or website names when referring to a product that has not been recalled.

The bill provides that any required information or disclosures must be clearly legible if in print or audible and intelligible if spoken, not tucked away in fine print.

Attorney advertising is commercial speech that is protected by the First Amendment. It can serve a valuable purpose in linking people who are injured as a result of wrongful conduct with a lawyer.[9] Legislators can and should step in, however, when lawsuit advertising misleads the public or jeopardizes public health.[10]

For these reasons, the U.S. Chamber of Commerce supports enactment of S.B. 150.

---

[9] The First Amendment protects commercial speech, including truthful advertising for legal services. *See Bates v. State Bar of Arizona*, 433 U.S. 350, 384 (1977). The Supreme Court has made clear, however, that "[a]dvertising that is false, deceptive, or misleading of course is subject to restraint." *Id.* at 383. For example, the Court has upheld state rules that prohibit lawyers from soliciting people in person or by phone when they are injured or distressed, and found that preventing "aspects of solicitation that induce fraud, undue influence, intimidation, overreaching and other forms of vexatious conduct" overrides a lawyer's interest in advertising his or her services. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464-65 (1978). The Court has also upheld disciplinary action when attorney ads fail to make disclosures needed to avoid misleading the public. *See Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 650 (1985).

[10] At least three states have enacted legislation similar to S.B. 150 including Tennessee, Texas, and West Virginia. See Tenn. S.B. 352 (2019) (codified at Tenn. Code §§ 47-18-5601 et seq.); Tex. S.B. 1189 (2019) (codified at Tex. Gov't Code §§ 81.151 et seq.); W. Va. Comm. Sub. S.B. 136 (2020) (codified at W. Va. Code Ann. §§ 47-28-1 et seq.).