
The Impact of Plaintiffs’ Lawyer Advertising on Mass Tort Litigation
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Stephen G.A. Myers
Member
Irwin Fritchie Urquhart & Moore LLC
New Orleans, Louisiana
smyers@irwinllc.com

Rustin Silverstein, Esq.
President
X Ante
Washington, D.C.
rs@silversteingroup.net

Introduction:

As defense attorneys, we know that legal advertising sponsored by plaintiffs’ lawyers and others drives—if not manufactures—litigation. We have all heard stories like the following, which was published by Dr. Evan Levine, a cardiologist practicing in New York:

* * * * *

I recently had an encounter with a patient who watched, in shock, a television ad portraying this new drug [Pradaxa] as problematic and dangerous. He sat in my waiting room anxiously waiting to see me. He was concerned that I had prescribed a medication, to prevent a stroke, as a result of his irregular rhythm, that could cause him to hemorrhage to death. “It’s all over the TV,” he told me. “I saw it on the commercials. *Pradaxa is causing people to bleed to death and I stopped it.* I don’t think I should be taking a drug that can make you bleed like that. People are suing too.

He had mistakenly placed himself at risk of a stroke by stopping the drug and spent his time and precious money (cost of a cab and the visit), to come to my office because he was convinced by a very convincing Madison Avenue ad that he was taking a dangerous drug.

Since many patients with atrial fibrillation are elderly and perhaps more easily persuaded by these slick ads, *such ads represent a kind of public health risk.* It took me an entire visit to educate him, again, about the risks and benefits of Pradaxa compared to Coumadin, and after our visit the patient decided to continue his Pradaxa. Lucky for him he did not have a stroke during the few weeks he was not anticoagulated with Pradaxa.¹

* * * * *

¹ Evan Levine, MD, *Your Medication Can Kill You; Call Your Lawyer!*, Leftist Rev. (May 19, 2012) (available online at: <https://www.leftistreview.com/2012/05/19/your-medication-can-kill-you-call-your-lawyer/evanlevine/>) (last accessed 6/1/2015) (emphasis added).

It is not mere coincidence that advertisements seeking persons injured by medicines, medical devices, or airbags have saturated the airwaves and now also dominate cyberspace. But despite their prevalence and increasing evidence of their impact on litigation, courts have been generally reluctant to allow evidence of the impact of legal advertising into the courtroom.

This presentation will discuss the existing legal precedents on the subject, the evolution and current landscape of legal advertising, new information that is available on legal advertising in this age of “big data,” and the ways that defense counsel might use this data to overcome the courts’ collective reticence to allow this sort of data into evidence.

Current Precedent on the Admissibility of Attorney Advertising

The most common, and obvious, argument advanced against the admissibility of evidence related to attorney advertising is that the risk of unfair prejudice substantially outweighs its potential relevance at trial—the axiomatic Federal Rule of Evidence 401/403 analysis. Typically, defendants attempt to introduce evidence of plaintiff attorney advertising, arguing that, under Rule 401, such evidence is both relevant and necessary evidence of plaintiff’s credibility with regard to the circumstances leading up to the filing of the suit. Alternatively, defendants may attempt to offer expert testimony under Rule 702 regarding the effect of legal advertising on the overall number of claims over time. In response, of course, the plaintiffs’ bar argues that the introduction of such evidence creates a risk of prejudice under Rule 403 and, as such, is inadmissible at trial.

Reported jurisprudence on the subject is surprisingly limited. The available rulings, however, indicate a hesitancy by courts to allow such evidence absent a concrete link to a key issue in the litigation. Simply suggesting that advertising must have had an impact is not enough. Fortunately, as will be addressed below, better information and resources are now available to arm defense counsel with improved arguments in favor of admissibility—and even short of admissibility, advertising data still provides strategic advantage to defense counsel and corporations in litigation. But first it is important to summarize the limited case law that is available; citations to additional cases can be found in Appendix 1.

In the *Norplant* litigation² (contraceptive implant), defendants sought to introduce expert evidence related to attorney advertising to counter the plaintiffs’ suggestion that declining sales of the product was evidence of a defect. The court prevented the defendants from doing so but also barred the plaintiffs from arguments about declining sales. Defendants further sought to introduce evidence of attorney advertisements instigating litigation by offering the “prospect of easy money” to claimants. This, however, the court found to be too prejudicial. The court granted plaintiffs motion to exclude such evidence of “lawyer made litigation,” noting that there was a wealth of other evidence available to challenge the plaintiffs’ credibility.³

² *In re: Norplant Contraceptive Products Liability Litigation*, 1997 WL 81087 (E.D. Tex. 1997) (MDL No. 1038).

³ *Id.*

A similar judicial attitude was displayed in the Prempro Products Liability Litigation⁴ (Prempro, Premphase, and Premarin). Via motion *in limine*, the plaintiffs sought to exclude evidence of attorney advertising. Defendants countered that the advertising was relevant to their statute of limitations defense.⁵ The court granted the plaintiffs motion in part and denied it in part. Notably, it allowed defendants to “refer to information received by Plaintiff at a particular time but cannot indicate that it came from lawyer advertisement.”⁶ Ultimately, the court opted for a narrow ruling to address the precise arguments by the parties but avoid actually admitting the legal advertising into evidence.

The same sentiment appeared in the *In re Welding Fume Products Liability Litigation*.⁷ There, defendants sought to introduce evidence of heavy advertising by plaintiffs’ attorneys, if the plaintiffs’ attorneys were allowed to introduce evidence of other lawsuits.⁸ The court excluded both.⁹ But the court did provide three limited exceptions when the existence of attorney advertising could be admitted:

- (1) If plaintiff saw advertisements describing symptoms before visiting a physician, then plaintiff can be questioned about viewing the advertisements and its content (but the advertisement itself was not admissible);
- (2) When questioning neurological experts, the defendants could address the fact that the plaintiffs had seen the advertisements, but they could not show the advertisement to the jury; and
- (3) If the plaintiffs’ witnesses “open the door” by testifying that potential claimants could not have known that their neurological symptoms were related to welding rod fumes, even after mass advertising by the plaintiffs’ bar commenced in 2002.¹⁰

The court reiterated that even under the enumerated exceptions, however, the advertising itself was not admissible and that “[t]he bottom line is: as much as possible, evidence of other Welding Fume lawsuits and of lawyer advertising will be excluded.”¹¹ It is noteworthy that even this hostile court found some circumstances in which legal advertising would be clearly relevant and admissible. Moreover, the case demonstrates the strategic advantage in developing such evidence, even if it is not ultimately used at trial (i.e., to sacrifice via motion *in limine* to secure the exclusion of other troubling that plaintiffs intend to present).

⁴ *In re Prempro Products Liab. Litig.*, No. 4:04CV01169, 2007 WL 3125106, at *1 (E.D. Ark. Oct. 24, 2007).

⁵ *In re: Prempro Products Liab. Litig., Hill, v. Wyeth et al.; Scroggin, v. Wyeth et al.*, 2007 WL 4985957 (E.D. Ark.) (Wyeth’s Responses to Plaintiffs’ Motions in Limine, p. 2).

⁶ *In re Prempro Products Liab. Litig.*, No. 4:04CV01169, 2007 WL 3125106, at *1 (E.D. Ark. Oct. 24, 2007).

⁷ No. 1:03-CV-17000, MDL Docket No. 1535 (N.D. Ohio).

⁸ *In re Welding Fume Prods. Liab. Litig.*, No. 1:03-CV-17000, 2010 WL 7699456 at *66-68 (N.D. Ohio June 4, 2010)

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

The most recent jurisprudence on the subject, however, is hopefully the start of a new trend. In the ongoing Risperdal litigation in Pennsylvania,¹² the court declined to exclude the evidence. Facing a motion *in limine*, the defendant argued both that the plaintiffs' motion was overly vague and that information concerning the basis on which plaintiffs decided to bring suit against Janssen (i.e., legal advertising) is relevant, not privileged, and not unduly prejudicial.¹³ The defendants explained that plaintiffs' attorney advertising was relevant because testimony suggested that the suit was instigated by a television commercial and not medical advice. Additionally, defendants explained that no privilege regarding the advertising has been raised and that, though the evidence was not favorable to the plaintiffs, this did not mean it was prejudicial.¹⁴ While not providing a thorough reasoning for the ruling, the court ultimately refused to grant the plaintiffs' motion, though it noted plaintiffs' right to assert specific objections at trial.¹⁵

Ultimately, the available jurisprudence demonstrates that if defense attorneys want to use this sort of evidence in the courtroom, there must be a direct and demonstrable link between the ads and a pivotal issue in the case. We need to be able to precisely explain to courts how this advertising is impacting a lawsuit or piece of litigation, and we need concrete data to support our assertions. This is no small hurdle. And to overcome it, we need to fully appreciate the current advertising landscape, as well as the new resources that are available to demonstrate the impact of legal advertising in the courtroom.

Current Landscape of Plaintiff Attorney Advertising

The annual growth in overall TV advertising by the legal services 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. Between 2012 and 2014, there were nearly 1.7 million ads related to drug and medical device mass tort litigation broadcast at an estimated cost of approximately \$400M. Additional millions were spent to broadcast ads related to other mass tort litigation cases such as asbestos/mesothelioma, the GM and Takata airbag recalls and the BP oil spill.

As mass tort advertising campaigns become increasingly national in scope, advertising has shifted from less expensive rates on local broadcast networks to more costly spots during national programming on national broadcast and cable networks and advertisers are paying more for fewer advertisements – as reflected in the graph below.

¹² *In re: Risperdal Litigation; W.C. et al., Plaintiffs v. Janssen Pharmaceuticals*, No. 130301803 (Pa. Com. Pl. 2015).

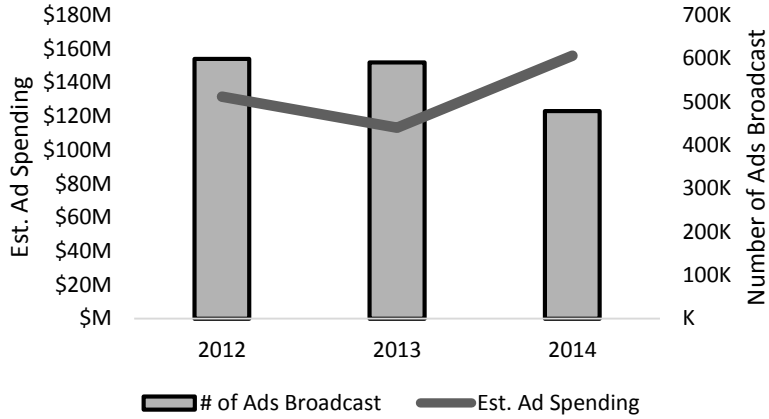
¹³ *Id.* at 2015 WL 1469627.

¹⁴ *Id.*

¹⁵ *W.C. v. Janssen Pharmaceuticals, Inc.*, 2015 WL 1505248 (Pa.Com.Pl.), 1.

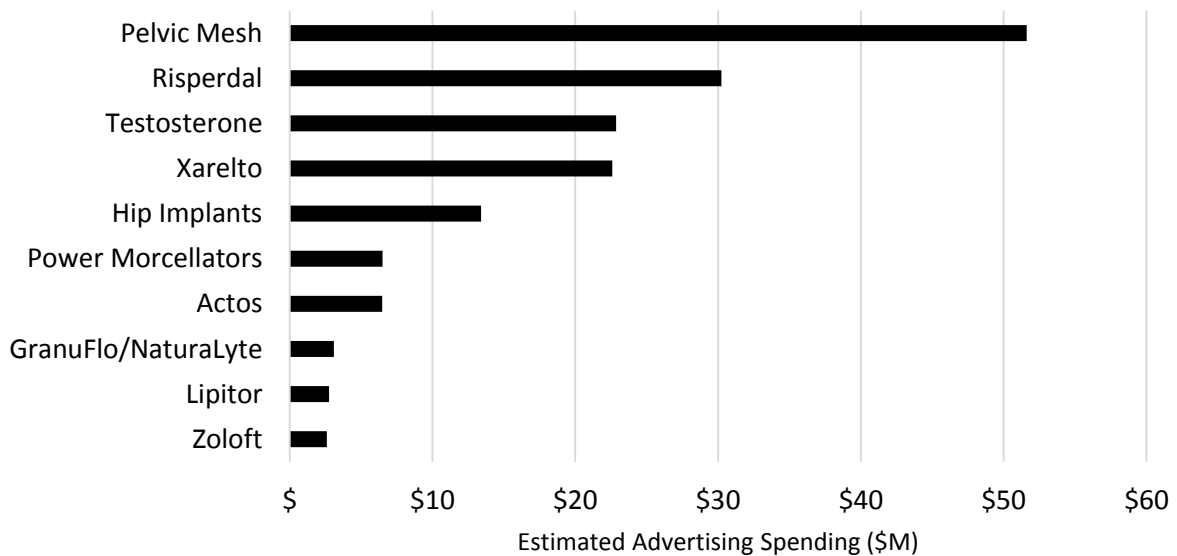
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Drug & Medical Device Mass Tort TV Advertising,
2012 - 2014

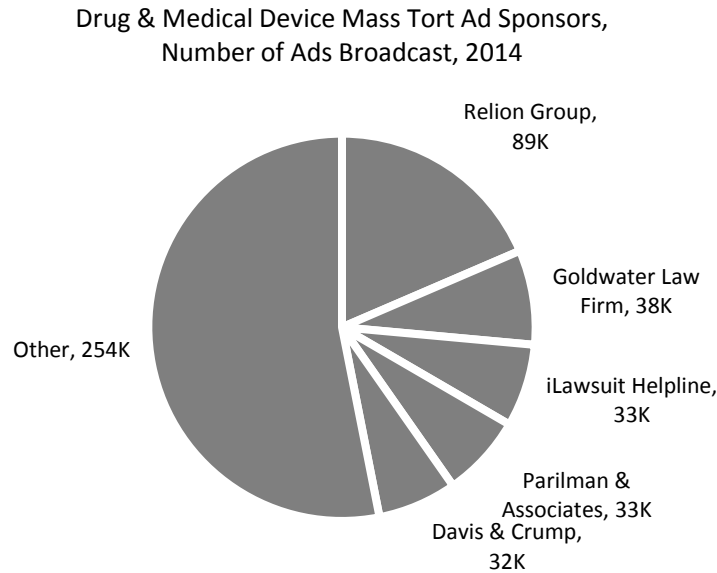


The sponsors of these ads cast a wide net in the products they target. For example, in 2014, mass tort TV advertisements featured over 30 different drugs and medical devices. However, nearly 90% of the drug and medical device mass tort advertising spending was devoted to ads targeting the ten products featured in the graph below.

Top Drugs & Medical Devices Targeted in Mass Tort Ads, 2014



Much of the TV advertising related to drug and medical device mass tort litigation is sponsored by a small number of firms. In fact, nearly half of all the ads broadcast in 2014 were sponsored by just five firms.



Many, if not most, of the sponsors of the drug and medical device mass tort ads do not actively litigate the cases they solicit. In fact, many advertisers are not even lawyers or law firms. Some of the advertisers are so-called “settlement mills” -- high-volume law practices with little client interaction that settle large volumes of cases quickly without ever filing in court. Others – like the Goldwater Law Firm seen in the chart above – are law firms that refer those who respond to their solicitations to other law firms who actually litigate the cases in exchange for referral fees or a share of contingency awards. Finally, many of the top sponsors of mass tort advertisements are not even law firms. They are “lead generators” – like the Relion Group. These are businesses who sell the names of alleged victims who respond to their advertisements to plaintiffs’ attorneys.

What Information is Now Available to Support the Admissibility Arguments Surrounding Attorney Advertising?

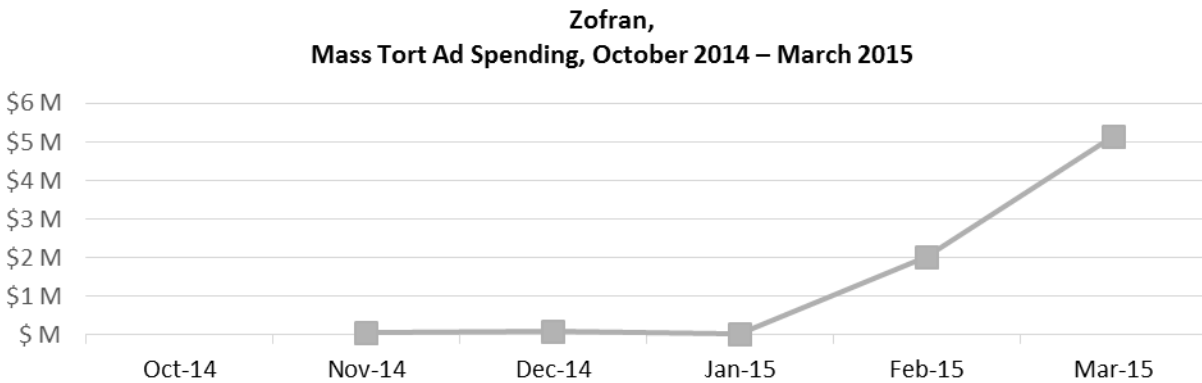
Comprehensive data on all mass tort litigation TV advertising broadcast in the United States is tracked and analyzed by the X Ante firm (www.x-ante.com).

X Ante works with outside and in-house counsel to Fortune 500 companies to provide detailed information on this advertising for use in all stages of litigation from monitoring threats before cases are filed to discovery, jury selection and trial arguments. It reports when the mass tort ads were broadcast, where they were broadcast, how often they were broadcast, who sponsored them and an estimate of how much was paid for the ad. Video files of the ads can also be provided.

The advertising data is gathered through automated and manual watching, reviewing and coding of mass tort product liability television advertisements in 210 local broadcast media markets and on 12 national broadcast networks, 8 Spanish-language networks, and more than 80 national cable networks. The mass tort television advertising database is updated in real-time and has records of all ads broadcast since 2005.

The ways to use this data are discussed in greater depth in the next section, but it is clear that mass tort advertising data is a new weapon to be wielded by defense counsel and manufactures in the litigation environment. To understand the possible uses, however, it is important to appreciate the breadth of the data that is available.

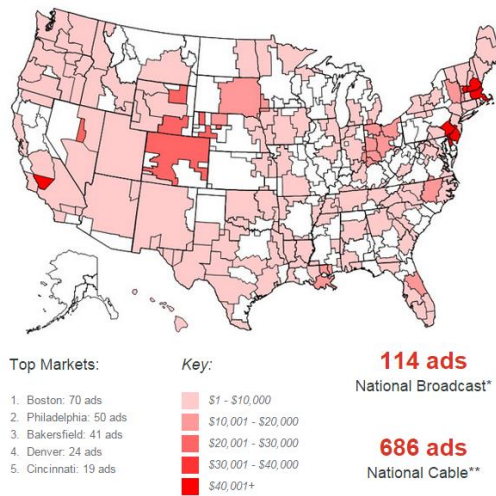
For instance, X Ante is able to provide product-specific reports that monitor trends in mass tort TV advertising, such as the following:



This data allows defense counsel and manufacturers to forecast a potential onslaught of litigation before lawsuits are filed and adapt accordingly.

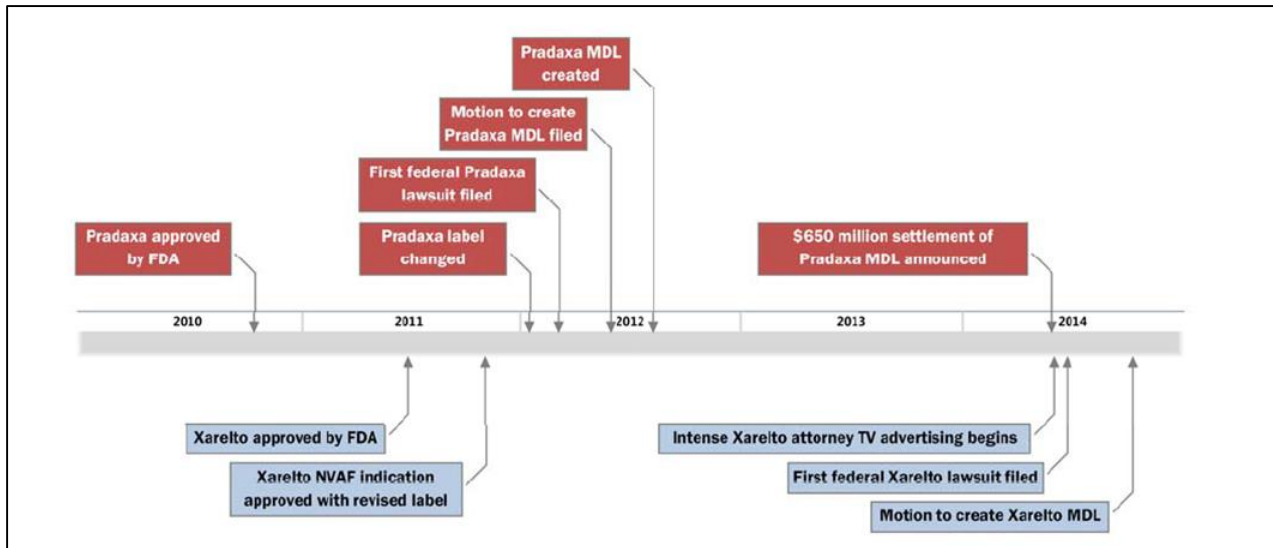
Moreover, the data is available at both the nationwide or local level, which can be used to identify potential litigation hotspots, as well as favorable and unfavorable venues for mass tort consolidation.

ZOFRAN MASS TORT ADS, FEBRUARY 2015.

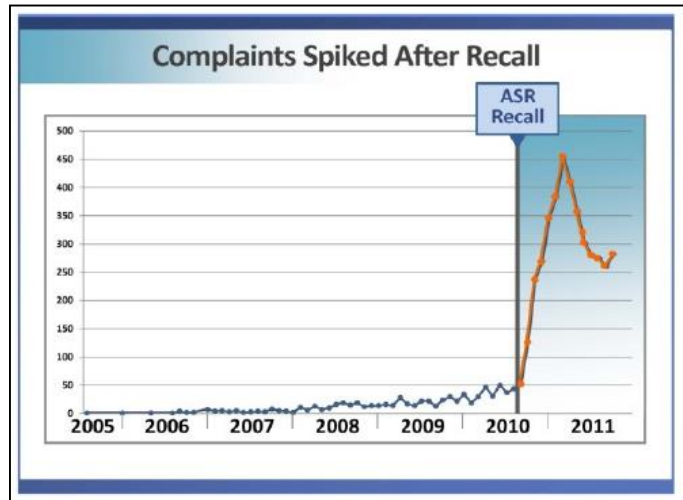


* Includes national broadcast networks such as CBS, ABC, and Fox.
** Includes national cable channels such as ESPN, CNN, and Fox News.

Data on mass tort TV advertising by X Ante or data on internet searches by Google Analytics can also be compared with internal company data on complaints rates, AERs/MDRs, and/or the number of lawsuits being filed. This sort of analysis may support arguments that advertising is driving litigation – and not a product defect. For example, the graphic below was used in a motion by Bayer to argue against the MDL consolidation of Xarelto claims.

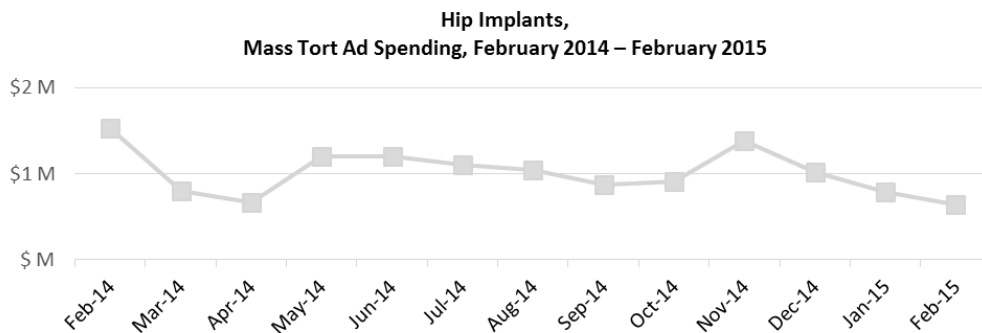


A similar approach was used by defense counsel in the metal-on-metal hip implant litigation in opposition to a motion *in limine* to exclude evidence of legal advertising. Using internal company data, the defendant was able to demonstrate a spike in product complaints following a product recall¹⁶:



However, this argument may have been even more effective if coupled with data showing that the dramatic spike in complaints also coincided with ubiquitous, product-specific advertising by plaintiffs’ law firms and others.

Finally, once litigation has commenced, trends in advertising volumes provide insight into the future progression of the litigation, including assistance in answering key questions related to litigation budgeting and when and whether to engage in settlement negotiations. For instance, the data below suggests waning interest by the plaintiffs’ bar and a likely decrease in the rate of new suits and claims. Thus, given this data, settlement negotiations may prove more fruitful than at early points in time.



The above are merely examples of some of the data that is available. Samples of the X Ante data reports are also included in Appendix 2.

¹⁶ Demonstrative Taken from Briefing, (Rec. Doc. No. 52), p. 4, McCracken v. DePuy Orthopaedic Products, Inc., No. 1:11-20485 (N.D. Ohio 2013).

How Can this Information and Data be Used by Defense Counsel and Corporate Clients?

Traditional, Single-Plaintiff Cases

- 1. Statute of Limitations Arguments**
 - Did the viewing of legal advertisements start the limitations countdown?
 - Did advertisements prompt the plaintiff to seek legal advice or medical treatment?
- 2. Knowledge of Risks (by plaintiff, physician, or other key witness)**
 - Did the ads inform the plaintiff of pertinent risk information before or during treatment?
 - Did the plaintiff continue to take the medicine or use the product in spite of widespread legal advertisements?
 - Has the prescribing physician seen the legal advertising?
 - Do the ads confirm that product risks were known within the community, including the medical community?
 - Did the ads prompt the physician to re-examine their prescribing practices for a particular medicine?
 - Did the advertising cause the prescribing physician to perform additional medical research on the actual risk profile of a particular course of treatment?
- 3. Alternative Cause for Symptoms**
 - Has the plaintiff seen advertising for the medicine or product in question?
 - Have her symptoms changed, as reported in the medical records, since advertisements began airing?
- 4. Alternative Cause of Emotional Distress**
 - Has the plaintiff seen advertising for the medicine or product in question?
 - Is that advertising truthful, accurate, and non-misleading?
 - Were the advertisements troubling to the plaintiff? (particularly when “fear of” claims are made)

Aggregate-Claim Cases (e.g., Class Actions, Multidistrict Litigation)

- 1. Alternative Explanation for Genesis of Litigation**
 - Are the plaintiffs arguing that the fact of widespread litigation indicates a product defect?
 - How does the number of suits filed over time compare with the levels of legal spending over time?
 - Would a statistician or biostatistician be able to conclude that there is a statistically significant relationship between estimated advertising dollars and number of lawsuits filed?

2. Alternative Explanation for Increases in Product Complaints
 - Are the plaintiffs arguing that large numbers of complaints is evidence of a defect?
 - Again, is there a statistically significant relationship between complaint rates and attorney advertising?
 - Would a biostatistician and/or epidemiologist be willing to so opine?
 - Would a biostatistician be able to demonstrate with advertising data, sales data, and complaints data that counties or states with similar demographics and sales figures demonstrate significantly different complaint rates due to disparities in legal advertising?
3. Alternative Explanation for Decreases in Product Sales
 - Are the plaintiffs arguing that decreased sales indicate a defective product?
 - How do sales compare with legal advertising surrounding that product?
 - Was the manufacturers marketing budget flat over the same time period?
4. Alternative Explanation for Poor Product Performance
 - Same thoughts apply.

How Else Can Attorneys and Manufacturers Use this Data to Their Advantage?

- **Early Warning and Monitoring Litigation Trajectory**

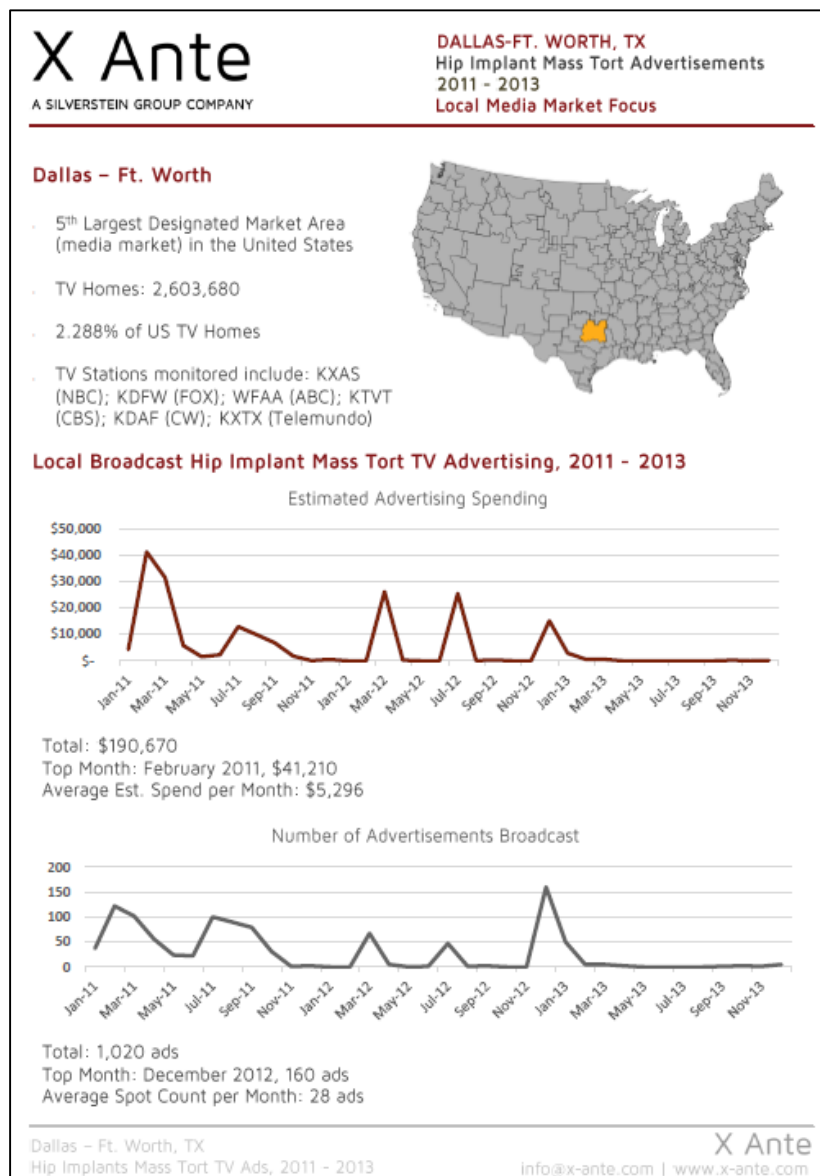
Legal advertising by plaintiffs lawyers provide a benchmark for how viable plaintiffs' attorneys believe litigation surrounding a product to be. By monitoring this sort of activity, manufacturers and their lawyers can forecast the potential for mass torts to develop around existing products. Likewise, month-to-month fluctuations in legal advertising provides insights into whether the worst is over or yet to come.

- **Post-Market Surveillance**

Corporate defendants, particularly manufacturers of pharmaceutical and medical products, dedicate enormous resources to post-market surveillance efforts. Combining traditional methods of tracking product performance with new sources of information, like levels of mass tort litigation advertising can offer greater insight into whether external forces are driving product complaints or whether corrective and preventative action is needed by the company. Likewise, such data can be used by companies to justify decision-making as to recalls or non-recalls to supervising regulatory authorities.

- **Identification of Problematic Venues and Jury Pools**

During the management of a mass tort, the first trials (whether in federal or state court) often set the tone for the duration of the litigation and the ultimate settlement discussions. The identification of geographic regions where plaintiff advertising is particularly intense allows counsel and clients to avoid bad venues. This information can be used to support change-of-venue motions, trial-continuance motions, briefing before the Judicial Panel on Multidistrict Litigation (JPML), voir dire questions, and even bellwether-case settlement values (when settlement would shift the epicenter of the litigation to a more favorable venue). *See, e.g.:*



Other Noteworthy Facts about Plaintiff Attorney Advertising

- 86% of consumers have seen drug-injury advertising.¹⁷
- 21% of consumers have seen such advertising about a medicine they were taking.¹⁸
- 25% of respondents would “immediately stop taking” a prescribed medicine if they saw a drug-injury ad on TV.¹⁹
- In a study by Eli Lilly, half of surveyed psychiatrists reported that patients had discontinued their prescribed medicines as a result of drug-injury advertising.²⁰
- In the 15 years following the 1977 U.S. Supreme Court decision in *Bates v. State Bar of Arizona*²¹, television advertising by lawyers increased from less than \$100,000 to more than \$113 million.²²
- Total spending on legal advertising was estimated to be \$428 million in 2002.²³
- It exceeded \$750 million in 2012.²⁴
- The factual backdrop of the *Daubert* precedent involved the medicine Bendectin, which was a combination of vitamin B6 and doxylamine (an anti-histamine) that was used to treat nausea in pregnant women.
- After a National Enquirer article suggesting a link between the medicine and birth defects, the medicine became the focus of widespread litigation and was ultimately removed from the market.
- In retrospect, the science now indicates that the medicine was safe and effective for pregnant women. The American College of Obstetrics and Gynecologists currently holds

¹⁷ Harris Interactive, Pharmaceutical Liability Study Report on Findings, (July 15, 2003).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Eli Lilly, “New Survey Shows Product Liability Litigation May Jeopardize Treatment Outcomes for People with Severe Mental Illness,” June 13, 2007 (available at: <https://investor.lilly.com/releasedetail.cfm?releaseid=248836>) (last accessed June 1, 2015).

²¹ 433 U.S. 350, 371-72 (1977).

²² Michael P. Stone & Thomas J. Miceli, *Optimal Attorney Advertising*, 32 INT’L REV. L. & ECON. 329, 329 (2012).

²³ Engstrom, Nora Freeman. *Legal Access and Attorney Advertising*. AM. U. J. GENDER & SOC. POL’Y & L. 19, no. 4 (2011): 1083, 1090.

²⁴ Legal Advertising Intelligence Report – June/July 2013, The Silverstein Group (available at <http://www.silversteingroup.net/-junejuly-2013-attorney-advertising-report.html> (last accessed 12/6/2013)).

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the position that taking Vitamin B6 plus doxylamine is safe and effective and should be considered a first-line treatment. This is based on “consistent scientific evidence.”²⁵

References and Additional Resources

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²⁵ American College of Obstetricians and Gynecologists (ACOG). Nausea and vomiting of pregnancy. Washington (DC): American College of Obstetricians and Gynecologists (ACOG); 2004 Apr. 13 p. (ACOG practice bulletin; no. 52).

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(available online at: www.bostonglobe.com/lifestyle/health-wellness/2014/06/18/study-finds-increase-suicide-attempts-after-fda-warning-antidepressants/Cv5nOqhD3oKQPvrnZMg3UL/story.html)
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About the Presenters:

Stephen G.A. Myers
Member
Irwin Fritchie Urquhart & Moore LLC
New Orleans, Louisiana
smyers@irwinllc.com

Stephen practices in the areas of products liability, pharmaceutical and medical device litigation, and railroad and transportation. Stephen's Martindale-Hubbell rating is AV preeminent® in the areas of both Products Liability and Litigation. He was selected as a Louisiana Rising Star in 2013 by the Super Lawyers organization and has since been promoted to a Louisiana Super Lawyer in 2014 and 2015. Before starting his legal career, Stephen graduated *magna cum laude* with departmental honors from the Tulane University School of Engineering and was a member of the Tau Beta Pi, the National Engineering Honor Society.

Rustin Silverstein, Esq.
President
X Ante
Washington, D.C.
rs@silversteingroup.net

Rustin is the founder and President of X Ante, a data analysis firm providing actionable intelligence on advertising soliciting plaintiffs for pharmaceutical, medical device, and other mass tort product liability lawsuits. Prior to founding the company, Rustin practiced law at a multinational law firm and worked as a consultant for a global management consulting firm. Rustin is a graduate of Harvard College and Harvard Law School and a member of the District of Columbia Bar and the State Bar of Arizona.

**APPENDIX 1:
CASES ADDRESSING THE ADMISSIBILITY OF LEGAL ADVERTISING**

1. *In re: Norplant Contraceptive Products Liability Litigation*, (E.D. Tex. 1997) (MDL No. 1038) (court ruling at 1997 WL 81087) (discussed above).
2. *In re: Silica Products Liability Litigation*, 398 F. Supp.2d 563, 596-604 (S.D. Tex. June 30, 2005) (MDL No. 1553) (discussing advertising efforts by plaintiffs' attorneys though not directly ruling on admissibility at trial).
3. *In Re: Prempro Products Liability Litigation, Hill v. Wyeth et. al.; Scroggin v. Wyeth et. al.*, MDL No. 4:03-CV-1507-WRW.; No. 4:04-CV-01169 (E.D. Ark. 2007) (defense briefing at 2007 WL 4985957; court ruling at 2007 WL 3125106) (discussed above).
4. *Deutsch v. Wyeth*, No. MID-L-0998-06MT (N.J. Super. L 2007) (Plaintiff motion at 2007 WL 4615753; defense opposition at 2007 WL 4856457; motion ultimately mooted when summary judgment was entered).
5. *In re Welding Fume Prods. Liab. Litig*, No. 1:03-CV-17000, 2010 WL 7699456 at *66-68 (N.D. Ohio June 4, 2010) (MDL No. 1535) (discussed above).
6. *McCracken v. DePuy Orthopedic Products, Inc.*, No. 1:11-20485 (N.D. Ohio 2013) (motion at Rec. Doc. No. 52, p. 4) (ruling at Rec. Doc. No. 68).
7. *In re: Risperdal Litigation; W.C. et al., Plaintiffs v. Janssen Pharmaceuticals*, No. 130301803 (Pa. Com. Pl. 2015) (briefing at 2015 WL 1469627) (ruling at 2015 WL 1505248) (discussed above).

APPENDIX 2 SAMPLE X ANTE REPORTS