Tort Taxes

The Impact on the US Citizen and the Drug and Device Lawyer

By Gabrielle C. Broders and Kelly E. Brilleaux

Masters can help resolve issues in a timely and efficient manner, but maintain awareness of and be proactive to avoid potential pitfalls.

What if you learned that your household annually paid thousands of dollars in taxes that you didn't even know you were paying? You might assume you're aware of all of the taxes imposed upon you and that you do everything that you can legally do to reduce your tax burden. As a pharmaceutical and medical device defense attorney, however, you might, in fact, have a fairly good idea of this tax burden you're currently shouldering—that's right, it's the tort tax and, as you may be aware, it does not have to simply be "the way it is."

Nationally, torts cost an average of $3,621 per household. *Tort Costs in America: An Empirical Analysis of Costs and Compensation of the U.S. Tort System*, US CHAMBER OF COMMERCE INSTITUTE FOR LEGAL REFORM p. 16 (Nov. 2022). Many people may think to themselves upon learning this, "I can rationalize this number. This tax is worth it to compensate people for the harm they've suffered or maybe it prevents future harm by encouraging responsible behavior." But you, learned drug and device lawyer, know that if that statement were actually true, it would be worth it. But, as you likely know all too well, that statement is simply false. And the research proves it: "[F]or every dollar paid in compensation to claimants, 88 cents were paid in legal and other costs." *Id*. at 8. Although there is no simple solution to this increasingly expensive problem that affects the entire country, by attacking one of the most infamous drivers of this tort tax – advertising – we can save consumers, and ourselves, thousands of dollars a year. Specifically, drug and medical device lawsuit advertising drives up the tort tax and has even resulted in a public health risk. To combat both, regulations and oversight equivalent to that which drug and device manufacturers are expected to comply should also apply to drug and device lawsuit ads.

Attorney Advertising: What Is It Good For? Absolutely Nothing (And No One)

At a national level, in 2021, more than 15 million advertisements for legal services aired on national and local television, totaling over $1 billion. Press Release, Am. Tort Reform Assoc., Study: Trial Lawyers Spent $1.4 Billion on Advertising in 2021 (Feb. 22, 2022) (***https://www.atra.org/2022/02/22/study-trial-lawyers-spent-1-4-billion-on-advertising-in-2021/***). To put this into perspective, in the same year, "pizza restaurants spent $67.4 million on a mere 845,000 advertisements...." *Id*. The numbers alone show the prevalence but fail to reveal the underlying problems. The specific and deep-seated problems come to light when we look at one of the biggest offenders: drug and medical device lawsuit ads.

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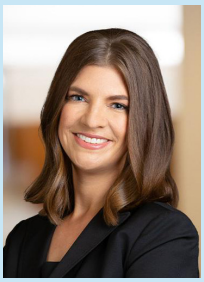

As an initial note, "attorney advertisements that truthfully inform consumers of the danger of such medications, as well as the availability of legal services for those who have been injured by such drugs, perform invaluable educational function for our society." *Examining Ethical Responsibilities Regarding Attorney Advertising: Hearing before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary,* 115th Cong. (June 23, 2017) ***https://www.govinfo.gov/content/pkg/CHRG-115hhrg29776/html/CHRG-115hhrg29776.htm*** (hereinafter "Subcomm. Hearing"). These drug and device lawsuit advertisements "inform[ ] injured consumers of legal remedies, offer[ ] wider access to attorneys, and hold[ ] manufacturers accountable." Elizabeth Tippett, *Medical Advice from Lawyers: A Content Analysis of Advertising for Drug Injury Lawsuits,* 41 AM. J. L. & MED. 7, 11 (2015) (hereinafter *"Medical Advice from Lawyers"*). There can be little doubt about the importance of warning doctors, consumers, and, in some cases, the general public about drug and device recalls, as well as their potential adverse effects. However, at issue are advertisements that "distort consumer medical decisions by causing them to misperceive drug-related risks." *Id*. at 12. A balance must be struck between warning of truthful and scientifically established adverse events without distorting these events and invoking panic among consumers. To strike this balance requires that the drug lawsuit advertisements must state facts without fearmongering, which, unfortunately, is quite the opposite of what is actually occurring.

Instead, drug and device lawsuit ads "undermine the simple notion that physicians and health care providers – not personal injury lawyers or the 'aggregators' who run the advertisements for the lawyer – should dispense medical advice." *Legal Services Advertising in the United States:* 2017-2021, AM. TORT REFORM ASS'N 1 (Feb. 2022) (hereinafter *"Legal Services Advertising in the United States: 2017-2021"*). These "doomsday advertisements" lead to patients abruptly stopping medications prescribed by their health care providers, "resulting in health problems for patients and increasing litigation risk for product manufacturers." *Id*. As the US Chamber Institute for Legal Reform reported:

> Many doctors have shared personal encounters with patients who stopped taking their medications without consultation as a result of a lawsuit ad. These physicians express deep concern that the advertisements bombard their patients with exaggerated and untrustworthy medical information, damage the trust they have developed with patients, place their patients' health at risk, and, in some cases, have led to tragic consequences.

Cary Silverman, *Bad for Your Health: Lawsuit Advertising Implications and Solutions,* US CHAMBER INST. FOR LEGAL REFORM 3, 3 (Oct. 2017).

Thus, it rings true that "lawsuit advertising does far more than generate claims." Id. at 19. In reality, it has caused a public health risk. The commercials that air on television would, ideally, target a small number of people who have experienced actionable injuries from drugs or medical devices. Nonetheless, most viewers are the general public, "including people who are considering seeking treatment and patients who are deciding whether to continue to take prescribed medication." *Id*. The adverse effects "described in the advertisements are often relatively rare, affecting fewer than 1 in 100 or even 1 in 1000 consumers taking the drug. Consequently, the vast majority of interested viewers are... uninjured consumers trying to decide whether to fill next month's prescription for the drug." *Medical Advice From Lawyers,* at 9–10. Surveys of patients and healthcare professionals, FDA reports, medical literature and academic research, and the firsthand experience of doctors reveal that these drug and device lawsuit advertisements bombard the general public with "information that is scientifically unsupported or significantly exaggerates the risks of drugs or medical devices [which itself] poses its own public health risk." Silverman, at 19. The doctor-patient dialogue is threatened, and vulnerable consumers are placed "at [an] even greater risk than that being hyped by the legal advertising at issue." *Id.* (citing Daniel M. Schaffzin, *Warning: Lawyer Advertising May be Hazardous to Your Health! A Call to Fairly Balance Solicitation of Clients in Pharmaceutical Litigation,* 8 CHARLESTON L. REV. 319, 341 (2014)).

Concerned for their patients, the American Medical Association ("AMA") House of Delegates adopted a resolution in 2016 that addressed these "fearmongering" drug lawsuit advertisements. *Attorney Advertisements on Drug Side Effects* H-105.985, Resolution 208, A-16, AM. MED. ASSOC. (June 2016) reaffirmed by Attorney Advertisements on Drug Side Effects H-105.985, Resolution 208, A-19, AM. MED. ASSOC. (2019); *see also* Silverman, at 31–32. Specifically, the AMA now "advocate[s] for a requirement that attorney advertising which may cause patients to discontinue medically necessary medications have appropriate and conspicuous warnings that patients should not discontinue medications without seeking the advice of their physician." *Id.*

To help get a better understanding of the public health risk created, a look at Xarelto® and its drug lawsuit advertisements are instructive. The United States House Judiciary Committee's Subcommittee on the Constitution and Civil Justice conducted an oversight hearing examining ethical responsibilities regarding attorney advertising, and, as one doctor testified regarding the Xarelto personal injury lawsuit advertisements:

> These advertisements imply a false choice, where patients can either decide to not take this medicine and be just fine, or take the medicine and potentially spontaneously bleed to death. That's actually not the case. If they don't take the medications, they could die, and are more likely to die, from a thrombotic event. But that is not ever mentioned in these commercials.

See "Subcomm. Hearing," cited *supra*. Between September 2014 and December 2015, after the Xarelto lawsuit advertising explosion began, "[t]he FDA received reports indicating that 31 patients who were prescribed Xarelto discontinued taking the medication after viewing a negative lawsuit ad and experienced a serious injury or death as a result." Silverman, at 24. Moreover, in a response that post-dated the Congressional inquiry, the FDA indicated that through December

31, 2016, "doctors submitted 61 reports[, some of which involved multiple patients,] indicating patients had discontinued or decreased their use of Xarelto or Pradaxa after viewing a lawsuit ad." *Id*. at 25. The reports showed that six of these patients died and others suffered strokes, cardiac arrest, pulmonary embolisms, transient ischemic attack, deep vein thrombosis of the arm, intracardiac thrombus, and cerebral and foot thrombosis. *Id*. Therefore, it is imperative that drug lawsuit advertisements appropriately warn consumers of scientifically supported adverse events and give conspicuous warnings to talk with a doctor before discontinuing any medication. Without such a warning, the drug and device lawsuit advertisements can be far more dangerous than the purported side effects of the drug or device that are listed out quickly at the end of the FDA-regulated TV commercials by drug and device manufacturers.

It will take a collaboration of state and federal entities to fully reduce the tort tax and protect consumers from the public health risk created.

Not only are consumers and the general public being harmed by these drug and device lawsuit advertisements, but the manufacturers themselves are harmed. The onslaught of lawsuits makes it almost impossible for the companies to closely scrutinize each individual case to see if it has merit, and this onslaught "is also likely to make headlines, damaging the reputation of the company, its brand, and its products." Silverman, at 40. Moreover, these advertisements may also influence citizens who may end up serving on a jury. *Legal Services Advertising in the United States: 2017-2021*, at 3. For example, one survey "found that 90% of jurors would be somewhat or very concerned if they saw an advertisement claiming a company's product injured people." *Id*. Moreover, an additional "72% of jurors agreed somewhat or strongly that if there are lawsuits against a company claiming its products injured people, then there is probably truth to the claim." *Id*. Prior to Johnson & Johnson's talcum powder trials in the St. Louis area, there was a saturation of lawsuit advertisements claiming that talcum powder causes ovarian cancer, which "led some to question whether these commercials are intended to solicit claims or whether their true purpose is to scare the public and influence the jury pool as trials approach." Silverman, at 4, 42–43.

Finally, these drug and device lawsuit advertisements lead to wasted time, effort, and resources in the courts. This waste is especially prevalent in drug and medical device MDL dockets. For example, in the *In re Mentor Corp. Obtape Transobturator Sling Products Liability Litigation,* US District Court Judge for the Middle District of Georgia Clay Land threatened plaintiffs' attorneys "that in future orders granting summary judgment in which no good faith basis existed for maintaining the action through the summary judgment stage, the Court intends to include an addendum in the order requiring counsel to show cause why sanctions should not be imposed." *In re Mentor Corp. Obtape Transobturator Sling Prods. Liab. Litig.,* No. 08-md-2004, Sept. 7, 2016 Order (Rec. Doc. 1039), at *1–2 (M.D. Ga. Sept. 7, 2016). Specifically, Judge Land observed that in many cases, plaintiffs' counsel had not identified a single expert witness, which is a requisite to prove medical causation in drug and device cases. *Id*. Even more shocking, in the same cases, plaintiffs' counsel failed to file an opposition in response to defendant's summary judgment motion. *Id*. This is simply another example of lawyers assuming that once they gather their clients through mass advertisement and have them swept into an MDL, their job is complete. They sit back and wait for the global settlement, hoping the day never comes when the individual claims are scrutinized.

So, if consumers, manufacturers, and the judicial system itself fail to benefit from these fearmongering injury advertisements, then who does? The answer is clear: trial lawyers who, armed with more clients, "boost settlements and payouts when they go after large corporations," and "lead[] to larger contingency fees for the lawyers themselves." *Legal Services Advertising in the United States: 2017-2021,* at 1. However, pinpointing this culpable group is not as straightforward as it appears because the drug lawsuit advertising market uses a process known as lead generation. Silverman, at 33. In fact, in pursuit of these leads, "[m]illions of dollars are spent on advertising and other practices to generate as many claims as possible, as quickly as possible." *Id*. The focus is on quantity over quality; "[w]hether the claim has merit is secondary. The end goal is to overwhelm a company with claims and pressure it to enter a global settlement." *Id*. And of the groups spending millions of dollars, "[j]ust five law firms and non-attorney marketing companies... sponsor about half of all drug and medical device mass tort advertisements on television." Id. at 1. Of the top five spenders, two are private companies. Jesse King and Elizabeth Tippett, *Drug Injury Advertising,* 18 YALE J. HEALTH POL'Y, L. & ETHICS 114, 122 (2019) (hereinafter *"Drug Injury Advertising"*). One is a "'lead management' company providing advertising services for lawyers," and, "[b]ased on its marketing materials, it appears to produce advertising content and provide ad buying services for individual law firms." *Id.* The second describes itself on its website as "not a law firm or referral service" and emphasizes that it "does not provide legal representation to visitors of this site." *Id.* Furthermore, the three top-spending law firms do not operate like typical law firms that would litigate cases, but instead, they act as lead generators. *See id.* at 123; *see also* Silverman, at 1, 9-10, 33–34.

A recent lawsuit in which the former chief business development officer of AkinMears, the top-spending law firm of 2015, sued his former employer revealed how these "law firms" operate. Silverman, at 33 (citing Plaintiff's Original Petition and Request for Disclosure, *Shenaq v. Akin,* No. 2015-57942, at 29 (D. Ct., Harris County, Tex. filed Sept. 29, 2015)). The complaint details the operation: "[AkinMears] is in the business of purchasing generic television spots, running a call center with script-reading 1-800 operators, signing up clients and bundling claims,

and then sending them en masse to other lawyers who will hopefully settle them." *Id.* at 34 (citing *Shenaq* Complaint). Most astonishing is that AkinMears could not actually represent a fraction of the clients it signs up because it handles tens of thousands of claims but *has a grand total of five (5) attorneys. Id.* This glorified claim processing center is, unsurprisingly, not the only one of its kind.

As is apparent in the world of mass tort litigation, and particularly in the drug and device context, there is a "disconnect between the litigation filings and advertising... [which] suggests that some law firms, and corporations, specialize in producing and financing advertising spots, while other law firms specialize in litigating." *Drug Injury Advertising,* at 123. For example, the law firm with the largest percentage of national advertising volume had few results in a search for the firm name in Bloomberg dockets. *Id.* In contrast, a law firm with fewer than 300 ad spots has "appeared in more than 2,5000 cases since 2012." *Id.* Therefore, the greatest offenders are not the attorneys actually litigating the cases but are rather the "law firms" and private companies acting as trumped-up call centers and advertising agencies.

The identity of the top drug and medical device lawsuit advertisers is particularly important in light of the fact that the ten most prolific national drug injury advertisers in 2015 and 2016 accounted for 72% of all advertising volume. *Drug Injury Advertising,* at 122. Notably, the top three advertisers accounted for about 50%. *Id.* Of these ten, three were private companies, together making up about 19% of the advertising volume. *Id.* The remaining seven advertisers are law firms. *Id.* Of the top ten firms, three – including the number one (21%) and two (19%) firms – "do not appear to litigate many cases that result from their advertising." *Id.*

What all of this tells us is that, because of the variety of sources of lawsuit advertising, it will take a collaboration of state and federal entities to fully reduce the tort tax and protect consumers from the public health risk created.

How Can We Reduce the Tort Tax and Protect against This Public Health Risk? Regulation and Oversight

Just as drug and device companies are subject to regulations and restrictions when promoting the benefits of their products, so should drug injury advertisements be subject to regulations and restrictions when promoting their services. Nonetheless, despite the concern expressed by legal groups, healthcare groups, drug and device manufacturers, Congress, and even federal judges, there is no oversight or regulation of

drug and device lawsuit ads. At the federal level, neither the FTC nor the FDA provide any regulation over drug and device lawsuit ads. The FDA closely monitors manufacturers and their drug and device advertising to ensure that advertisements do not overstate the effectiveness of a drug or understate its risks. Silverman, at 4. In contrast, the FDA does not monitor information disseminated in drug lawsuit advertisements that understates, or plainly ignores, the benefits of a drug and that overstates its risks. *Id*.

Perhaps the FTC, then, is the better federal agency to regulate drug and device lawsuit ads. The FTC's purpose is broadly stated as safeguarding "consumer sovereignty," *In re Int'l Harvester Co.*, 104 F.T.C. 949 (1984), and "the FTC has broad jurisdiction over all forms of broadcast advertising, including advertising from lawyers." *Drug Injury Advertising,* at 126. Nevertheless, "the FTC traditionally defers to state bars and attorney disciplinary authorities" when attorneys engage in the same advertising practices that the FTC prohibits in other ad contexts. Silverman, at 4-5. In addition to deferring to state bars and attorney disciplinary committees, the FTC views the FDA as having the primary responsibility in drug injury advertising because "[a] Memorandum of Understanding (MOU) between the agencies provides that the FDA has primary responsibility for regulating the truth or falsity of advertising of prescription drugs, while the FTC has primary responsibility for regulating the truth or falsity of advertisements for over-the-counter drugs and medical devices...." *Id*. at 49.

Nevertheless, the FTC and FDA have the structure and institutional knowledge to regulate and oversee advertising on a national scale. Specifically, the FDA already oversees prescription drug advertising, and the FTC already oversees health-related products not covered by the FDA. The advertisement rules governing prescription drugs and health-related products under both agencies specifically restrict ads from being false or misleading. And yet, advertisements about drug and device lawsuits have no such restrictions in place. Per the Model Rules of Professional Conduct, "[a] lawyer shall not make a false or misleading communication *about the lawyer or the lawyer's services."* See Model R. of Prof. Cond. 7.1 (emphasis added). There are no regulations regarding the medical information provided (or lack thereof), the regulatory status, the recall status, or the effects of stopping a drug cold turkey, to name a few. The FDA already has authority and laws covering prescription drugs and medical devices and the FTC already has authority and laws covering health-related products. With the laws and structure already in place, it would perhaps make the most sense for Congress to extend the authority of the FDA and FTC over drug and device lawsuit ads to the extent they have authority over the drug and device ads themselves.

However, as of now, without any significant federal regulation, the oversight of drug injury advertisements is ultimately left up to the states, specifically state bar associations and the judiciary. Silverman, at 50. This reliance is misguided for several reasons. First, state bars and disciplinary authorities focus the regulation of attorney advertising on whether advertisements will mislead potential clients regarding the lawyer's services, not whether they mislead the general public regarding public health issues. *Id*. Second, state bars or disciplinary authorities take action after a complaint has been filed, and "most individuals who are misled by lawsuit advertising targeting drugs or medical devices are unlikely to file a complaint with a state bar." *Id*. at 51 ("Professor Elizabeth Tippett's research uncovered no instance of a state bar bringing an action against an advertiser for ethical breaches or consumer harm associated with lawyer advertisements in recent decades. They may be reluctant to take action that will face significant resistance from a segment of their own membership and may result in an expensive legal challenge" (citing *Medical Advice From Lawyers,* at 40-41)).

Third, and perhaps most significantly, no state bar or disciplinary committee can reach non-lawyer advertisers, such as lead generators and marketing firms, because state bar associations and disciplinary committees can only regulate attorneys that provide legal services within each's jurisdiction. *Id*. at 52. "Legal services" are defined broadly "to include 'services provided by one in the ordinary course of the practice of [law] on behalf of another.'" *Gerdes v. Estate of Cush,* 953 F.2d 201, 205 n.8 (5th Cir. 1992) (quoting *Jensen v. Snellings*, 841 F.2d 600, 613 (5th Cir. 1988) (alterations in original)). Moreover, legal services are performed when one renders services that utilize his knowledge and training as an attorney. *See Jensen,* 841 F.2d at 614. By contrast, "merely filling in forms with factual information and performing other 'ministerial' services does not constitute the... practice of law." La. Att'y Gen. Op. No. 08-0046 (Nov. 12, 2008). However, to give legal advice on the legal effects of these forms is considered "practicing law." *Id*. Additionally, malpractice insurance contracts define "legal services" to mean "those services performed by [a lawyer] for others as a lawyer...." Id. Accordingly, any attempt by state bar associations and disciplinary committees to reach lead generators and advertising agencies is futile because they do not perform legal services under the applicable definition.

Using these understandings of "legal services" and "practicing law," out-of-state law firms taking calls, collecting consumers' information, and sending that information to attorneys who will litigate the cases likely does not fall under the definition of "legal services." But even if these actions constitute "legal services," the law firms who qualify as the most prolific drug injury advertisers are conducting these actions in just a handful of states. In considering a "top ten" list, the number one, five, six, and nine most prolific advertisers are located in Texas. *Drug Injury Advertising, at 122*. The second most prolific advertiser is located in Arizona. *Id*. Numbers three and four are marketing service groups rather than law firms. *Id*. The seventh most prolific advertiser is located in Missouri and number eight is in Kansas. *Id*. Finally, as of the publication of this article, the number ten most prolific advertiser is no longer in operation. *Id*. Notably, though, of these prolific advertisers that are law firms, the law firms are not actually offering to provide legal services because they never intend to, nor in fact do, actually litigate these cases anywhere.

Finally, bar associations are, overall, in the process of moving toward less regulation of advertising, viewing the

constraints as outdated. Silverman, at 52. Specifically,

> [c]hanges proposed by the Association of Professional Responsibility Lawyers (APRL) to the *American Bar Association's model rules of professional conduct governing attorney advertising do not address the troubling practices employed to generate pharmaceutical and medical device mass tort litigation.* Rather, the proposed rule changes would permit solicitations of clients through "organized information campaigns" that would include television, internet, and other forms of electronic communications and explicitly permit lawyers to use legal fees to pay for online group advertising services.

Id. (citing APRL Proposed Amendments to ABA Model Rule of Professional Conduct 7.1, 7.2, 7.3, 7.4, and 7.5 (Sept. 29, 2016) (proposed change to Rule 7.1)) (emphasis added). In March 2017, House Judiciary Chairman Bob Goodlatte sent letters to the ABA and state bar associations urging them to adopt rules consistent with the AMA's resolution and asking them to self-regulate. *Id*. In response, the ABA President stated that a working group was reviewing the issue, but "[w]hile the AMA resolution and explanation state that attorney ads have the potential to frighten people and thus cause them to discontinue taking their medicine, it does not allege that those ads are false, misleading or deceptive." *ABA president addresses issues surrounding lawyer advertising* (Oct. 12, 2017) (***https://www.americanbar.org/advocacy/governmental_legislative_work/publications/ washingtonletter/april2017/advertising***). To date, the ABA has not taken any action.

The only groups that have taken any concrete steps are individual state legislatures across the country, which have attempted to enact tort reform legislation with bills focused on curtailing legal services advertisements. To date, the following states have either proposed or passed regulations curtailing drug and medical device legal services advertisements:

- California (killed), *see* A.B. 3217, 2017-18 Reg. Sess. (Ca. 2018) (passed out of the Assembly with bipartisan support and no "no" votes but was killed after the Consumer Attorneys of California expressed opposition);
- Florida (died in judiciary), *see* S.B. 1992, 2021 Reg. Sess. (Fla. 2021); Indiana (passed), see Act of Apr. 29, 2021, Pub. L. 176, Ind. Laws 2021 Reg. Sess.;
- Kansas (passed), *see* Act of Apr. 25, 2022, S.B. 150 (Kan. 2021);
- Kentucky (pending in the Senate), *see* S.B. 20, 2021 Reg. Sess. (Ky. 2021);
- Louisiana (passed), *see* S.B. 378, 2022 Reg. Sess. (La. 2022);
- Tennessee (passed), *see* Tenn. Code §§ 47-18-3002 et seq.;
- Texas (passed), *see* Tex. Gov't Code §§ 81.153 et seq.; and
- West Virginia (passed), *see* W. Va. Code §§ 47-28-1 et seq.

Nonetheless, this tort reform is seemingly all for nought because state Supreme Courts, not state legislatures, regulate lawyer advertising and "legal services."

Unfortunately, the plaintiffs' bar knows this. For example, after the Louisiana legislature passed a legal services advertisement bill in 2020, one prominent attorney "said he was going to wait on the Louisiana Supreme Court before changing his commercials." Mark Ballard, *Lawyer advertisements in Louisiana were supposed to change in 2021; here's why the rules won't be enforced,* THE ADVOCATE (Jan. 11, 2021) (***https://www.theadvocate.com/baton_rouge/ news/politics/elections/article_6b90af90-545a-11eb-ae7e-1770a8321976.html***). The attorney went on to say, "[l]awyers in Louisiana, according to our State Constitution, are regulated by the Louisiana Supreme Court, not the Legislature... If our Supreme Court enacts some measure requiring that, then I'll review at that time and decide if I'm going to challenge the constitutionality of it." *Id*. Moreover, the Louisiana Attorney Disciplinary Board's Chief Disciplinary Counsel stated that he would not be enforcing the new regulations on attorney advertising until the Louisiana Rules of Professional Conduct were amended by the Louisiana Supreme Court. *Id*.

Nonetheless, the Louisiana Supreme Court did not take the hint. It has only issued a single press release stating that "[a]dvertisements and unsolicited written communications that contain a reference or testimonial to past successes or results obtained must contain a disclaimer such as 'Results May Vary' or 'Past Results are not a Guarantee of Future Success." Press Release, La. Supreme Court (May 6, 2021).

Although it may now seem like we have hit the end of road, all hope is not lost for regulations and oversight. First, drug and device lawsuit advertisements, as with most mass tort advertisements, are uniquely positioned because the majority of the advertisers are out-of-state groups that are either non-attorneys (or are attorneys who do not provide or offer to provide legal services in that state). Accordingly, state legislatures can continue to pass drug and device lawsuit advertising laws in order to target the lead generators and advertising agencies. Second, state bar associations, state Supreme Courts, and disciplinary authorities should incorporate drug and device lawsuit advertising rules comparable to those passed by state legislatures and supported by the AMA in order to target any lawyers and law firms that do provide legal services. And finally, because the FDA and FTC already have the structural and institutional knowledge to regulate and oversee advertising on a national scale, they should incorporate the drug and device lawsuit advertising rules passed by state legislatures and supported by the AMA to fully reduce the tort tax and protect consumers from this public health risk.

As these state and federal groups (hopefully) make progress towards initiating drug and device lawsuit advertisement regulations and oversight, the tort tax will no longer simply have to be "the way it is." Unfortunately, as much as we may like to reduce our tax burden completely, the most we can offer is a few thousand dollars a year back in your pocket. Although the only things certain in this world are death and taxes, tort taxes do not have to be one of them.