

# LAW: CALL 1-800-GET-CASH FAST: DRUG-RELATED ADVERTISEMENTS ABOUT LITIGATION

Drug-Related Advertisements about Litigation

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## DISCLOSURE

- ▶ Jeannette Wick has no relationships with ineligible companies

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## LEARNING OBJECTIVES

After completing this continuing education activity, learners will be able to

- Explain common terminology associated with commercials targeting older Americans
- Describe legal processes associated with lawsuits generated against companies that make products alleged to cause harm
- Discuss generalities in potential lawsuits associated with media promotion campaigns
- Identify areas where no information is available to provide good, valid answers for patients who ask questions

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### ▶ Television commercials target older Americans

- ▶ *Did you or a loved one take such-and-such a drug? If you or a loved one did take that drug, did you develop a (specific health condition like cancer) or perhaps did your loved one die?*
- ▶ "You may be entitled to significant compensation."
- ▶ Who answers the phone at those 1-800 numbers?
- ▶ What data do they collect?
- ▶ What happens next?
- ▶ If patients become part of a lawsuit, how much money do they walk away with at the end?

CALL 1-800-GET CASH FAST

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## WHAT IS THE LEGAL LINGO FOR THESE CASES?

- Class action suits
- Torte claims
- Product liability suits

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- ▶ Tobacco against the 4 largest U.S. tobacco producers
- ▶ Johnson's talc products caused ovarian cancer
- ▶ A.H. Robbins company and its Dalcon shield contraceptive device
- ▶ Various companies that produce contraceptive pills
- ▶ Ranitidine, Vioxx (rofecoxib), Risperdal (risperidone)
- ▶ Medical devices (e.g., hip replacement devices and transvaginal mesh)
- ▶ Antioxidants including Agent Orange, asbestos and Roundup
- ▶ Opioids
- ▶ Talcum powder

HIGH-PROFILE COURT CASES

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- Most companies entertain <2 lawsuits annually
- A few seem to entertain the preponderance
- Johnson & Johnson, Pfizer, Inc., and Merck & Co., Inc had > 500 pending cases annually between 2006 and 2016
- Only 1% lost by judgment
  - Settlement is preferred
- 17% land in MULTIDISTRICT LITIGATION (MDL)

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- ▶ Patients become law plaintiffs; companies become defendants
- ▶ Cases may enter the justice system
  - ▶ via the individual state's court systems
  - ▶ in the state where the patient resides, or
  - ▶ in the state where the company is incorporated (or be moved to that state)
- ▶ With almost all large cases, plaintiffs reside in many states that operate under a variety of laws and constraints
- ▶ Consolidating the cases into a federal court is prudent.

**MULTIDISTRICT LITIGATION**

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- ▶ A large number of identical or similar cases can overwhelm the court system
- ▶ Consolidation = economy of scale
- ▶ Three possible avenues:
  - ▶ class action litigation
  - ▶ multi district litigation (MDI)
  - ▶ *parens patriae*

**WHY CASE CONSOLIDATION?**

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Litigation type	Description
Class action litigation	<ul style="list-style-type: none"> <li>• Many plaintiffs bring cases against few defendants</li> <li>• Rule 23 of the Federal Rules of Civil Procedure indicates how class action cases are certified at the federal level</li> </ul>
Multi district litigation	<ul style="list-style-type: none"> <li>• Designed to handle a large number of cases in which clients allege the same thing</li> <li>• Tend to involve complex scientific and medical data</li> </ul>
<i>Parens patriae</i>	<ul style="list-style-type: none"> <li>• "Civil suits brought by state attorneys general against mass tortfeasors for injuries to the states citizenry."</li> </ul>

**CASE CONSOLIDATION: HOW?**

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- ▶ 4 prerequisites before 1 or more members of the class may sue or be sued as representatives on behalf of all class members:
  - ▶ The class must be "so numerous that joinder (consolidation) of all members is impracticable."
  - ▶ There must be "questions of law or fact common to the class."
  - ▶ The representative parties' claims or defenses must be "typical of the claims or defenses of the class."
  - ▶ Potential representatives must "fairly and adequately protect the interests of the class."

**CLASS ACTION**

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**WHAT GROUPS HAVE TRADITIONALLY BEEN REPRESENTED IN PARENS PATRIAE SUITS?**

- State residents who appeal to the state to represent them
- Smokers and people who have opioid or alcohol use disorder
- Children, the mentally ill, people who are legally incompetent

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- ▶ Must meet 3 criteria. The individual state must
  - ▶ "allege injury to a sufficiently substantial segment of its population"
  - ▶ "articulate an interest apart from the interests of particular private parties (i.e., the state must be more than a nominal party)"
  - ▶ "express a quasi-sovereign interest"
- ▶ Traditionally used to address the treatment of children, mentally ill individuals, and individuals who are legally incompetent

**PARENS PATRIAE**

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- ▶ Chief Justice of the US Supreme Court selects 7 judges from across the country to sit on the Judicial Panel on MDL
  - ▶ Selects proceedings that will be heard by a single federal judge
  - ▶ Selects the specific judge (transferee judge) who will hear the cases
  - ▶ Considers location of discovery materials, witness convenience, geographic distribution of the actions, a specific judge's knowledge, and the judge's willingness to handle the docket
- ▶ Transferee judge
  - ▶ Decides whether the case can be classified as a class action suit or multidistrict litigation

**MULTI DISTRICT LITIGATION**

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- ▶ ~ **16%** of all pending federal civil cases were MDL's in 2000
- ▶ Now, **95%** of pending cases in the federal system are MDLs

**MDL**

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- ▶ Who will handle my case and will I have direct access to the attorney?
- ▶ Have you or your firm worked in this area of multidistrict litigation in the past?
- ▶ Who in your firm will contact me for information or to provide information?
- ▶ Who are your affiliated attorneys or law practices, and have you worked with them before?
- ▶ How will the attorney update me?
- ▶ BEWARE: Advertising attorneys

**ATTORNEYS**

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- ▶ Retainer or fee agreements solidify the law firm's obligations to the plaintiff and detail the fees that the firm will charge to represent the plaintiff
  - ▶ COMPLICATED!!!
- ▶ Should address
  - ▶ Contingent fee charged only if the outcome is favorable
  - ▶ Common-benefit fees (3% to 5%) deducted from the plaintiff's attorney's contingency fee to pay the lead lawyer
  - ▶ Interest charges on costs and expenses
  - ▶ Arbitration provisions

**RETAINERS AND FEES**

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**WHAT IS USURY LAW?**

- Laws pertaining to the use of a commercial product that results in alleged harm to a group of people who become plaintiffs
- Laws pertaining to lending money at an interest rate that is unreasonably high or higher than the rate permitted by law
- Laws pertaining to any claim that arises in civil court, with the exception of contractual disputes, property, or criminal activity

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- ▶ MDL can be costly for plaintiffs who are ill
  - ▶ May need basic financial support during ongoing litigation
- ▶ May apply for third-party consumer legal funding
  - ▶ Provides cash on a nonrecourse basis
  - ▶ The client/plaintiff must repay the amount of the loan plus the one-time fees and monthly interest only if the client/plaintiff is compensated once the lawsuit is resolved
  - ▶ Not subject to usury law
  - ▶ May be predatory lending

**MDL COST TO PLAINTIFFS**

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- ▶ Expert testimony must rely on
  - (1) a valid and repeatable scientific experiment
  - (2) a peer-reviewed or published study
  - (3) a standard that controls the theory
  - (4) a known or potential rate of error
  - (5) a widespread acceptance of the findings in the scientific community
- ▶ Pharmacists are sometimes expert witnesses

**EVIDENCE WILL LOOK AT**

- ▶ Strength of association
- ▶ Consistency
- ▶ Specificity
- ▶ Temporality
- ▶ Biologic gradient
- ▶ Plausibility
- ▶ Coherence
- ▶ Experiment
- ▶ Analogy

**EXPERT TESTIMONY**

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**WHEN DISCUSSING MDL, WHAT DOES THE ADJECTIVE "GENERIC" MEAN?**

- A. It means that most tort claims do not include generic drugs; they focus on brand names
- B. It means assets (documents, expert opinion, interviews, etc) that apply to all plaintiffs
- C. It means developing charts, timelines, and visuals that a judge and jury will understand

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Generic assets	Specific assets
Used for the group <ul style="list-style-type: none"> <li>• hiring experts</li> <li>• finding scientific information that proves that a product causes a specific outcome</li> <li>• requesting and reviewing documents from corporations</li> <li>• interviewing and deposing witnesses</li> </ul>	Must develop each individual client's case and prove causality
• Once they gather this information, they must create charts, timelines, and visuals that a judge and jury will understand.	

**EXPERT TESTIMONY AND "ASSETS"**

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- ▶ **Bankruptcy**
  - ▶ Creates non-opt-out settlements for mass tort liability
  - ▶ Used by Perdue Pharma to deal with the current OxyContin lawsuit
  - ▶ Creates litigation advantage
  - ▶ Injured parties can apply to various trusts that are created to settle the claim, but they cannot sue the company, its subsidiaries, or its insurance carriers.
- ▶ **Divisive mergers (Texas Two-Step)**
  - ▶ Reallocate assets and liabilities between 2 new entities
  - ▶ One company receives assets of nominal value, becomes liable for all mass tort claims. It files for bankruptcy.
  - ▶ The other company holds valuable assets
  - ▶ Increases the risk of non-recovery for future litigants
  - ▶ Pits current plaintiffs against future plaintiffs, delays case resolution

**DEFENDANT TACTICS**

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- ▶ Often connected to an advertising attorney
- ▶ Connected to a call center
- ▶ Screened for minimum criteria
- ▶ Often transferred to another law firm
- ▶ Bellwether cases examined first

- ▶ If the case settles
  - ▶ Each plaintiff will receive a settlement offer
  - ▶ Settlements are tailored to the damage the individual plaintiff has suffered and the number of plaintiffs in the MDL
  - ▶ Each individual may decide whether to accept the offer
  - ▶ Pressure to settle MDLs is quite strong

**WHAT CAN TYPICAL PEOPLE EXPECT IF THEY CALL 1-800-WHATEVER?**

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A PATIENT ASKS YOU IF YOU CAN DETERMINE HOW MUCH MONEY HE MIGHT GET IF HE JOINS AN MDL ON RANITIDINE. WHAT DO YOU SAY?

- A. Call the 1-800 number advertised on TV; the operator can provide that information.
- B. Go to the local library and access LegalTrac; settlement amounts are tracked closely.
- C. That information is guarded closely by nondisclosure agreements; it's hard to tell.

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- ▶ Lawyers hold their cards close to their chest
- ▶ MDL settlements are private, and plaintiffs sign nondisclosure agreements
- ▶ It's almost impossible to know how much money plaintiffs receive
- ▶ In MDL, each plaintiff's settlement differs based on the extent of the plaintiff's damages

THE END RESULT?

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- ▶ 6000 plaintiffs filed suit against a major pharmaceutical company
- ▶ Plaintiffs alleged a liquid cherry flavored gastroprokinetic drug caused a variety of poor health outcomes
  - ▶ Marketed liquid for older adults with dysphagia
  - ▶ The vast majority of its use: off label in pediatric patients
- ▶ Approximately 30 million people took the drug.
- ▶ FDA received 340 reports of heart rhythm abnormalities and 302 reports of deaths in which the medication may have been implicated

ONE CASE (THAT WE KNOW ABOUT)

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WHO RECEIVED THE LION'S SHARE OF THE SETTLEMENT?

- A. The patients/plaintiff
- B. The attorneys
- C. Others

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- ▶ 38 patients/plaintiffs recovered a total of \$6.5 million
- ▶ The lead lawyer received \$22 million
- ▶ A Canadian program received \$8 million
- ▶ A Louisiana public health initiative received \$8 million
- ▶ The balance of the settlement fund was returned to the pharmaceutical manufacturer

THE ANSWER

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- ▶ Most local attorneys cannot afford to mount such a campaign of this size
- ▶ Joining a class action suit or an MDL presents an entirely new set of challenges for plaintiffs
- ▶ It's difficult to know what to tell patients when they ask about litigation
- ▶ It's also a good idea to tell patients that you are not an attorney, and you cannot give legal advice
- ▶ Patients need patience; these cases linger for many years

CONCLUSION

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