

Expert Insights: Chubb Excess Casualty's Liability Market Analysis

West Virginia Law Requiring Truth in Attorney Advertising for Medication or Medical Device Suits Upheld

This Expert Insights edition focuses on recent developments in West Virginia law. Specifically, the Fourth Circuit Court of Appeals recently reversed a West Virginia District Court's decision overturning a statute designed to protect consumers from false information in attorney advertisements regarding potential claims relating to medical devices and medication usage. The law prohibits ads billed as "consumer medical alerts," "health alerts," "public service health announcements," or "substantially similar phrasing." It also requires that any ads regarding drugs or medical devices include the following warning:

Do not stop taking a prescribed medication without first consulting with your doctor. Discontinuing a prescribed medication without your doctor's advice can result in injury or death.

It must also be disclosed that "the subject of the legal advertisement remains approved by the U.S. Food and Drug Administration, unless the product has

been recalled or withdrawn." The law, entitled the "Prevention of Deceptive Lawsuit Advertising and Solicitation Practices Regarding the Use of Medications Act" was passed in 2020.

In *Recht v. Morrissey*, – F.4th –, 2022 WL 1233240 (4th Cir. Apr. 27, 2022) several plaintiffs challenged the law in the Northern District of West Virginia, arguing the law unfairly infringed on the First Amendment and the public's right to receive or communicate truthful information concerning prescription drugs and medical devices that have harmed other consumers.

The District Court judge John Preston Bailey agreed with Plaintiffs, finding the statute unfairly burdened protected advertising speech, and enjoined the statute in May 2021. West Virginia Attorney General Patrick Morrissey appealed to the Fourth Circuit arguing the police power of the State allowed it to safeguard the health and safety of its citizens. The Fourth Circuit, siding with Morrissey, stated that West Virginia's duty to its citizens

extended to ensuring that over-the-top, doomsday ads did not scare consumers to the point that they would avoid using prescribed medications without consulting their healthcare providers.

In particular, the Fourth Circuit's Order states "...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 plaintiffs submitted a petition for an *en banc* rehearing in early May, but there is no indication of whether the Fourth Circuit will grant that request.

Update:

On May 13, Georgia's governor, Brian Kemp, signed the apportionment bill (HB 961) into law. The new law restores the right to apportion fault to non-parties in cases brought against only one defendant, but it applies to all cases filed on and after May 14, 2022.



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