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Chicago and 2 California Counties Sue Over Marketing of Painkillers

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As the country struggles to combat the growing abuse of heroin and opioid painkillers, a new battlefield is emerging: the courts.

The City of Chicago and two California counties are challenging the drug industry's way of doing business, contending in two separate lawsuits that "aggressive marketing" by five companies has fueled an epidemic of addiction and cost taxpayers millions of dollars in insurance claims and other health care costs.

The severity of drug abuse is well documented: Use of prescription opioids contributed to 16,651 deaths in the United States in 2010 alone, and to an estimated 100,000 deaths in the past decade. When people cannot find or afford prescription painkillers, many have increasingly turned to heroin.

The lawsuits assert that drug makers urged doctors to prescribe the drugs far beyond their traditional use to treat extreme conditions, such as acute pain after surgery or injury or cancer pain, while underplaying the high risk of addiction. Such marketing, the plaintiffs say, has contributed to widespread abuse, addiction, overdose and death.

Taking the drug makers to court recalls the tobacco liability wars of the 1990s, with government entities suing in the hope of addressing a public health problem and forcing changes from an industry they believed was in denial about the effects of its products. The tobacco settlement led to agreements by the tobacco industry to change marketing practices, which is a goal of the opioid lawsuits.

But there are differences: The $246 billion tobacco settlement involved a product that was at best lightly regulated, while narcotics are already heavily regulated by federal and state government. Still, the private law firms that have filed the opioid suits, including the public-interest firm Cohen Milstein Sellers & Toll, have encouraged governments to join their fight.

The Chicago lawsuit cites an estimate that about 1,100 emergency room visits in the city in 2009 could be attributed to opioid abuse and overdose, with the city paying $9.5 million in insurance claims for prescriptions since 2008 and much more in related health care costs.

Investigators have reviewed hundreds of thousands of pages of internal corporate documents that they obtained through subpoenas under local ordinances. Stephen Patton, corporation counsel for the City of Chicago, said, “It was a suit we would not have brought unless we felt we had a rock-solid legal and factual basis for doing so.”

The other lawsuit was filed in California by Orange and Santa Clara Counties. Five companies were named as defendants: Janssen Pharmaceuticals, a Johnson & Johnson pharmaceutical company that makes Duragesic and other opioids; Purdue Pharma, which makes OxyContin and other drugs; Actavis, the maker of Kadian and some generic opioids; Endo Health Solutions Inc., the maker of such opioids as Percocet and Opana; and Cephalon, a subsidiary of Teva Pharmaceutical Industries that makes such opioids as Actiq and Fentora.

The opioids litigation was a topic of much discussion in June at the annual summer meeting of the National Association of Attorneys General in Mackinac Island, Mich., said William H. Sorrell, the Vermont attorney general. Noting that the governor of Vermont, Peter Shumlin, devoted most of his State of the State address to the growing problem of opioids and heroin addiction, Mr. Sorrell said, “we are taking a look at the issues” and the litigation.

Although the lawsuits, filed in state courts, tailor their arguments to local law and circumstances — Chicago used its consumer fraud ordinance to subpoena internal documents from the drug companies — they are similar. Both open by stating, “A pharmaceutical manufacturer should never place its desire for profits above the health and well-being of its customers.”

The materials obtained from the companies by Chicago include the industry’s funding of patient information groups. One of them, the American Pain Foundation, received $10 million from the companies and played down the addiction potential of the drugs, according to court filings, with messages to consumers such as, “opioids are rarely addictive when used properly for the management of chronic pain.” This appears to conflict with an internal document from the pain foundation that discusses “the lack of confirmatory data about the long-term safety and efficacy of opioids in non-cancer chronic pain.”

One agreement cited in the lawsuit said that the foundation and Purdue Pharma “will work collaboratively to develop and approve key messages.”

Tony Rackauckas, the district attorney for Orange County in California, said he is not trying to outlaw the drugs but “to require these companies to change their conduct and to tell people — to tell the doctors, to tell the patients — tell them that these drugs are dangerous. Tell them they are addictive, and you could overdose on them, and you could die.”

He said that using private law firms in cases like this one was necessary. “It’s going to require a lot of resources,” he said, and “when you’re bringing a case against companies that have substantial funds, they try to wear you down, basically, with paperwork.” The private firms provide deep expertise in mass litigation and the subject area.

Pharmaceutical companies declined to comment in detail about the lawsuits. Robyn Reed Frenze, a spokeswoman for Janssen, said, “We’re currently reviewing the

complaint." She said that "Janssen is committed to ethical business practices and responsible promotion, prescribing and use of all our medications." Representatives of Actavis, Purdue Pharma and Teva said the companies would have no comment.

Purdue paid $655 million in settlements with the federal and state governments in 2007 over civil and criminal complaints related to the "misbranding" of OxyContin as having a low potential for abuse, but crushing a tablet and then snorting or injecting the powder produced an intense high. The company stopped shipping its original formulation in 2010. It created a new formula, approved by the Food and Drug Administration that same year, which the F.D.A. deemed more difficult to abuse by crushing and dissolving, though it stated that abuse "is still possible."

The public health toll from the prescription of narcotic painkillers has only grown since then.

James Tierney, a former Maine attorney general who advised states during the tobacco litigation, expressed doubt that the opioid suits would ultimately draw many clients from among the ranks of state legal officials. Mr. Tierney said the officials are increasing enforcement of drug laws and monitoring doctors and pharmacies for signs of pill mills and Medicaid fraud. By comparison to the tobacco litigation, he said, the judicial process should be a last resort. "The tort system is so clumsy and unfocused," he said.

The cases bear important differences, Mr. Tierney explained. "This is not tobacco," he said. Opioids, he noted, are highly regulated products whose use can be tracked and which, when used properly, offer important benefits to patients. By comparison, tobacco was regulated lightly, and in the normal course of its use causes illness and death — facts that the industry long denied.

Still, Michael Moore, a former Mississippi attorney general who filed the first state case against the tobacco industry in 1994, said he was intrigued. "I definitely think it has potential," he said. "I may get back involved."