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Drugmakers lose round in marketing suit

BY PATRICIA MANSON
Law Bulletin staff writer

Three drugmakers have lost a bid to shield information they supplied during an investigation into the marketing of prescription painkillers.

In a written opinion, Cook County Associate Judge Sanjay T. Tailor declined to block a newspaper from obtaining documents the pharmaceutical companies gave to the city of Chicago in its inquiry.

Tailor held that neither protective orders nor the Illinois Freedom of Information Act prevent USA Today from seeing the documents.

Tailor, however, held that the city must redact trade secrets from one of the documents — a marketing plan for a drug called Fentora — before disclosing it.

Materials ordered released without redactions include a 21-page pamphlet titled “Finding Relief: Pain Management for Older Adults” and related documents.

The documents sought by USA Today are among the materials the city subpoenaed in an investigation into whether pharmaceutical companies are deliberately misleading the public about the risks of opioids — opium-like painkillers that can be highly addictive.

The city later filed a lawsuit accusing drugmakers of violating Chicago's False Claims Ordinance by marketing opioids for long-term use to treat pain that is not related to cancer.

The suit seeks to recover nearly \$9.5 million the city paid since 2007 to fill opioid prescrip-

tions under its health insurance plan for city employees and retirees.

Defendants in the suit include Janssen Pharmaceuticals Inc., Teva Pharmaceutical Industries Ltd. and Cephalon Inc. Teva acquired Cephalon in 2011.

After the city filed the suit in Cook County Circuit Court in June, the drugmakers removed it to federal court under diversity jurisdiction. *City of Chicago v. Purdue Pharma LP, et al.*, No. 14 C 4361.

Last year, a USA Today reporter filed a request with the city under the Illinois FOIA seeking certain documents produced by drugmakers during the investigation.

The companies asked U.S. District Judge Elaine Bucklo to enter a protective order requiring the city to deny the request while the suit is pending.

But Bucklo tossed out the drugmakers' motion, saying the scope of the Illinois FOIA was a question that belonged in the Illinois courts.

Bucklo did not address the merits of the city's underlying suit. It remains pending in federal court.

Back in Cook County Circuit Court, Teva and Cephalon — referred to together as “Teva” in Tailor's opinion — filed one motion and Janssen filed another asking that the city be barred from disclosing the documents sought by USA Today.

Tailor allowed the newspaper to intervene in the matter so it could object to the drugmakers' motions.

The city also objected to the attempt to block disclosure of



Sanjay T. Tailor

the documents.

In his opinion, Tailor wrote that agreements the drugmakers reached with the city — a protective order in Janssen's case and a confidentiality agreement in Teva's — do not bar disclosure in all circumstances.

Both state that their terms should not be interpreted to conflict with the city's duty to comply with public disclosure laws, Tailor wrote.

“Neither Janssen nor Teva can be heard to complain that they were assured confidentiality under all circumstances,” he wrote.

Quoting *City of Champaign v. Madigan*, 2013 IL App 4th 1206602, he also held that the documents sought by USA Today are public records under the Illinois FOIA because they concern “business or community interests, rather than private affairs.”

And Tailor rejected the argument that the documents are shielded under various exemptions in the Illinois FOIA.

He issued his opinion last week in *City of Chicago v. Janssen Pharmaceuticals Inc.*, No. 13 L 10572, and *Teva Pharmaceutical Industries Ltd., et al. v. City of Chicago*, No. 14 CH 17129.

USA Today's attorney, Jeffrey I. Cummings of Miner, Barnhill & Galland P.C., said he is pleased with Tailor's ruling.

The marketing of opioids to people they were not designed to aid, he said, is a matter of public concern.

“It deals with public financing for the city of Chicago and public health issues for the residents of the city,” he said.

Tinos Diamantatos of Morgan, Lewis & Bockius LLP, who represents Teva and Cephalon, declined to comment, saying the case is pending.

Scott D. Stein, a partner at Sidley, Austin LLP who represents Janssen, did not have an immediate comment.

Attorneys from the corporation counsel's office representing the city on the Illinois FOIA matter are Michael J. Dolesh, Fiona A. Burke and Mary E.C. Wells.

“We believe that the court correctly ruled that this information should be released under FOIA and does not constitute trade secrets,” Law Department spokesman John Holden said in a statement.

“The disclosure of this information will bring further daylight to this important public health issue and to what we believe was a deliberate plan by certain opioid manufacturers to cause the over-prescription of these very addictive and dangerous opioid drugs.”