

To Lower Prescription Drug Costs, States Head to the Courthouse

Legislative change has been slow, so some states are enlisting their chief lawyers to take on corporations instead.

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Last month, the Federal Trade Commission released a scathing [report](#) suggesting that pharmacy benefit managers, the middlemen in the drug supply chain known as PBMs, are “profiting by inflating drug costs and squeezing Main Street pharmacies.”

The FTC found that because of consolidation in the industry, the three largest PBMs now manage nearly 80% of all prescriptions filled in the United States. PBMs use that power, the agency concluded, to raise drug prices, control patients’ access to them, and steer people away from independent pharmacies and toward the pharmacies they own.

A week after the FTC [released its report](#), Vermont [filed](#) a [lawsuit](#) against CVS, Evernorth Health Services (a subsidiary of insurance giant Cigna) and nearly two dozen affiliated entities, claiming they have “distorted the market to their benefit at the expense of Vermont patients” and the state. The PBMs, the suit claims, “are driving up drug prices and foreclosing patients’ access to life-sustaining treatments in order to increase their profits.”

Vermont was the first state to file a lawsuit specifically citing the FTC report, but it probably won’t be the last.

States increasingly have been turning to lawsuits against PBMs in their drive to lower prescription drug prices. They’ve done so partly because of the barriers they’ve faced in trying to address the problem through legislation, including fierce lobbying by PBMs and [a federal law](#) that prevents them from helping the two-thirds of Americans who get their health coverage through their employers and so-called self-funded plans.

In taking their fight to courthouses, states also are turning the tables on corporations that have used lawsuits to block legislative attempts at regulation.

“Pharmaceutical companies themselves have a scorched-earth policy towards any legislative or regulatory changes. In other words, the industry will throw every claim it can think of at the states to try to block implementation of the law,” said Robin Feldman, a professor at UC Law San

Francisco and an expert on pharmaceutical law.

State legislators and policymakers “have decided that if [their laws] are going to end up in court, perhaps they might have their own claims to bring,” Feldman told Stateline.

In the past couple of years, [Arizona](#), [Hawaii](#), [Indiana](#), [Kentucky](#), [Ohio](#) and [Utah](#) have sued PBMs, and complaints from dozens of states and municipalities across the country have been consolidated into [multidistrict litigation in New Jersey](#).

And in June, [32 state attorneys general](#) and five [pharmacist trade groups](#) joined a lawsuit in support of an Oklahoma law that would place [tough new regulations](#) on PBMs — but which the companies have blocked in court.

Illinois Democratic state Sen. Laura Fine, who serves on the Health and Human Services Committee and has pushed for new regulations on health care companies, said she has been frustrated by the limitations of legislation.

“I’m glad that we have attorneys general who will take on these issues and these causes on behalf of the people in our state,” Fine told Stateline. “I think it’s an important tool in the toolbox for everyone to know that if we cannot accomplish what needs to get done, we have our attorneys general behind us to make sure that they can be out there to protect the consumer.”

Major players

As intermediaries in the drug supply chain, PBMs determine which drugs are available under a person’s insurance plan, set copayments and decide how much pharmacies must pay to acquire drugs.

The PBMs argue that they use their bargaining power to negotiate lower drug prices for consumers and pharmacists. They blame drug manufacturers — often known as Big Pharma — for prices that are higher in the United States than anywhere else.

Greg Lopes, vice president of public affairs and communications for the Pharmaceutical Care Management Association, a trade association representing PBMs, wrote in an email to Stateline that “any notion that PBMs are increasing prescription drug costs is patently false.”

“Employers choose to hire PBMs because they have a proven track record of lowering drug costs for health plan sponsors, which translates to lower premiums and lower out-of-pocket costs for patients,” Lopes wrote. “PBMs protect the ability of employers to offer quality health coverage by serving as the only check against Big Pharma’s unlimited pricing power.”

David Winthrop, vice president of external affairs at CVS Health, which owns the PBM CVS Caremark, said the company “is proud of the work we do to make medicine more affordable for American businesses, unions and patients.”

“Any policies that would limit PBM negotiating tools would instead serve as a handout to the pharmaceutical industry, leaving those who pay for prescription drugs at the mercy of the prices drugmakers set,” Winthrop said.

The Federal Trade Commission sees the problem differently.

It notes in its report that CVS Caremark is among the three major players that dominate the PBM landscape, along with Express Scripts and Optum Rx. Express Scripts is a subsidiary of Cigna, and Optum Rx is owned by UnitedHealth. Together, the FTC asserts, the three companies use their supremacy to “wield enormous power and influence over patients’ access to drugs and the prices they pay.”

“This can have dire consequences for Americans, with nearly three in ten surveyed Americans reporting rationing or even skipping doses of their prescribed medicines due to high costs,” the FTC report states.

The agency also notes that PBMs harm independent pharmacies, “who struggle to navigate contractual terms imposed by PBMs that they find confusing, unfair, arbitrary, and harmful to their businesses.” Between 2013 and 2022, the report states, about 10% of independent retail pharmacies in rural America closed.

“Health plans and PBMs are often just trying to protect the status quo as it remains today, for obvious reasons, because the environment has benefited them significantly,” said Antonio Ciaccia, CEO of 46brooklyn Research, a nonprofit that studies drug pricing data.

Daniel Aaron, an associate professor at the S.J. Quinney College of Law at the University of Utah who specializes in health care policy, pointed out that pursuing litigation allows states to sidestep PBMs’ lobbying power in legislatures.

Aaron argued that legislation and litigation can work in tandem.

“Lawsuits can actually help form policy,” Aaron said in an interview. “And because these lawsuits attract a lot of attention and capture the public interest and expose a lot of documents, they can actually buttress policymaking and attract even more public attention.”

He also noted that by taking on unpopular defendants, state attorneys general can raise their political profiles — and many of them aspire to be governors.

Ben Widlanski, the co-lead attorney in a lawsuit involving insulin prices, agreed that lawsuits are valuable because they shine a light on companies’ conduct in a way that state and federal regulators have been unable to do.

“Because there’s not a lot of oversight and because the government agencies responsible for it have not really been doing their jobs for a very long time, the only immediate response that has any chance of making a difference is litigation,” said Widlanski, a partner at Florida-based Kozyak

Tropin & Throckmorton.

In suing large corporations, state attorneys general often hire outside law firms on a contingency fee basis.

The limits of litigation

Aaron said successful lawsuits “can hold parties accountable, at least in theory, for illegal conduct and for causing harm. It can increase the cost of engaging in illegal conduct by making that conduct more expensive.”

But Ron Howrigan, a former Cigna executive, cautioned that using litigation to rein in deep-pocketed corporations isn’t as effective as enacting strong laws — however difficult that might be. Howrigan said many large health corporations consider expensive legal settlements to be merely the cost of doing business.

“I don’t think they’re really necessarily worried that the individual litigation is something that’s going to shut it down,” said Howrigan, who is now president and CEO of Fulcrum Strategies, a firm specializing in insurance contracts. “As a friend of mine put it, it’s putting ‘Band-Aids on bullet wounds.’”

What health care corporations are really scared of, Howrigan said, are sweeping policy changes.

“If I’m an insurance company, I’d much rather pay millions of dollars in fines than have a new law that I have to comply with going forward,” he said. “So, I’m not going to say that lawsuits don’t have any impact. But they don’t have nearly the impact as what legislative change would have.”

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