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Arkansas Democrat Gazette

NORTHWEST ARKANSAS EDITION

State plans lawsuit against drug firms

BY SETH BLOMELEY
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Attorney General Dustin Mc-Daniel told lawmakers Friday he's planning a lawsuit against three major pharmaceutical manufacturers over a "marketing scheme" for anti-psychotic drugs paid for by the state Medicaid program.

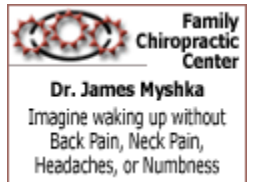



Some taking the drugs shouldn't have been given them and have developed side effects, he said.

McDaniel told the Legislative Council he could seek as much as \$ 600 million for the state and that he's taking the unusual step of contracting with a private law firm to take the lead in the litigation. He said the firm, Bailey Perrin Bailey LLP of Houston, will bear all the expenses and its fee will be 15 percent of the award.

"It's extraordinarily reasonable for the quality of work we're going to get," McDaniel said. "This particular matter is so large that frankly the AG's office could not handle it internally. If [the suit] is not successful we don't owe a dollar."

He said the firm is handling similar litigation for six other states



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A national coalition of about 30 state attorneys general is involved in a similar investigation of anti-psychotic drug marketing but McDaniel said he declined to join that effort because he feared Arkansas would "be lost in the shuffle."

McDaniel said Gov. Mike Beebe was satisfied that the state needed outside help in the case. Lawmakers voiced no objections.

The lawsuit should be filed in Pulaski County Circuit Court within three to four weeks, a spokesman for McDaniel said.

A letter McDaniel wrote to the council says "substantial evidence" exists to support a claim by the state for "improper and unlawful marketing" of anti-psychotic drugs by Eli Lilly & Co. of Indianapolis; Janssen Pharmaceutica of Titusville, N. J.; and Astra Zeneca, an international company formed by the union of a United Kingdom firm and a Swedish firm.

The drugs in question are Zyprexa, Risperdal and Seroquel.

Officials with those companies didn't return telephone messages left by the Arkansas Democrat-Gazette.

McDaniel told reporters after the meeting that researchers have known since the 1950 s that anti-psychotic drugs had serious side effects, including weight gain, hypoglycemia and Type II diabetes.

"What [the three companies] did was intentionally hide that and downplayed the efficacy of alternatives," he said.

McDaniel said the companies engaged in a "marketing scheme that was very effective to where a drug that was never approved by the [federal Food and Drug Administration] for children... the elderly... or run of the mill behavioral disorders like depression, all of a sudden was touted to America's doctors, Arkansas ' doctors, as a miracle drug. So, a child that has [attention deficit disorder] is taking a drug that was never authorized for that child, causing serious complications... that could last a lifetime."

He said the state Medicaid program has spent \$ 200 million on those drugs over the last eight years and, under Arkansas' Medicaid fraud law, the state could collect three times that much.

But it's unclear at this point what percentage of those Medicaid prescriptions were necessary and what percentage were improper, said McDaniel's chief deputy, Justin Allen.

A McDaniel spokesman couldn't say late Friday what the statute of limitations is on Medicaid fraud cases.

McDaniel said what generally happens is that pharmaceutical representatives will push doctors to prescribe the drugs based on

representatives will push doctors to prescribe the drugs based on what the company tells them.

"Technically, does the doctor have liability if he thereafter prescribes it? Maybe, but the concern for the state is the overall marketing scheme, and those who made profit over it," he said. "The [state] Medical Board should certainly give consideration regarding how much trust is placed in pharmaceutical reps."

McDaniel said the prescriptions in questions were "off-label."

Scott Smith, a lobbyist for the Arkansas Medical Society, a doctors' trade association, said that means for uses not approved by the FDA.

"It's my understanding that physicians can prescribe medicines for uses not approved by the FDA for a particular ailment but the distinction is that pharmaceutical companies are not supposed to be marketing physicians for that," Smith said.

Waiting for FDA approval before prescribing the drugs can take years and waiting could mean "life or death" for some patients, he said.

Smith said he hasn't heard of any problems with Zyprexa, Risperdal and Seroquel in Arkansas.

Officials at the Arkansas State Medicaid Board couldn't be reached for comment late Friday.

According to a St. Petersburg Times report in July, the Medicaid program in Florida last year spent \$ 27. 5 million on anti-psychotic drugs for children, an increase of nearly 500 percent over the last seven years.

That report said that Medicaid and insurance programs have pushed the drugs as a less costly alternative to psychotherapy for children, but some psychiatrists say the drugs are too risky for children because the young patients' brains are still developing.

Arkansas Medicaid Director Roy Jeffus and a Department of Human Services spokesman didn't return messages Friday.

During the legislative meeting, Sen. Ruth Whitaker, R-Cedarville, asked McDaniel about the law firm's qualifications.

McDaniel said he started working on the issue in the days before he was sworn in in January. He said only about eight firms nationwide are qualified to handle such litigation. He said he interviewed applicants for the contract "exhaustively" and the Houston firm rose to the top because it is already working on the issue in representing Pennsylvania, South Carolina, Alaska, New Mexico, Louisiana and Mississippi.

The other firms that applied for the contract were: The Miller Firm LLC of Orange, Va. Allen L. Rothenbert P. C. of Yardley, Pa. Schiffrin Barroway Topaz & Kessler LLP of Radnor, Pa. Heninger Garrison Davis LLC of Birmingham, Ala.

"This is going to be massive litigation and it was not selected willy-nilly," he told Whitaker.

McDaniel emphasized that his office, not the Houston firm, would have final say on major decisions involving the lawsuit.

Problems arose in 1998 when former Attorney General Winston Bryant arranged for a San Diego firm to help him in the state's litigation against tobacco companies. But Bryant never used the firm and settled the litigation along with other states. Arkansas' expected take was between \$ 50 million and \$ 60 million a year. The firm sued the state, saying it had done work for Arkansas and deserved to be compensated, but the state prevailed in court.

Since then, the attorney general's office has only used one private firm on a contingency basis and that was under Attorney General Mark Pryor and involved asbestos claims. That was Dies & Hile LLP of Orange, Texas, said spokesman Gabe Holmstrom.

McDaniel said he expects no problems with the Houston firm.

"This law firm has never contributed to my campaigns... nor the lawyers in the firm, nor their spouses, nor their kids, I think," he told reporters. "If there is a kid or a cousin that slipped through we didn't know about it." Information for this article was contributed by Laura Kellams of the Arkansas Democrat-Gazette.

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