

# The Opioid Crisis Goes to Court

Cities and counties across Alabama turn to the courts to find help in dealing with an addiction that's especially rampant here.

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**Opioid manufacturers are being sued by hundreds of cities and states, seeking compensation for the cost of public safety and health services generated by the crisis.**

On June 18, Alabama Attorney General Steve Marshall spoke to a group of healthcare professionals in Huntsville about the opioid crisis, noting that while the state still ranks No. 1 in number of prescriptions per capita, prescriptions were down 23 percent.

On June 24, his wife Bridgette committed suicide in Murfreesboro, Tennessee. Soon after, Marshall said she suffered from mental illness and opioid addiction.

Marshall is co-chairman of the Alabama Opioid Overdose & Addiction Council. His office, like those in most other states, has sued one of the most-well known opioid manufacturers. Yet the abuse of opioids is so pervasive in Alabama that even his own family was touched by it.

As recently as 2016, there were 121 opioid prescriptions for every 100 people in Alabama, or 1.2 prescriptions for every person including children. That's actually a decrease from 2012, when the rate was 143.8 per 100. Still, there were 741 overdose deaths in 2016, according to the council's report released in December of last year.

The grim statistics put Alabama in the thick of civil and criminal litigation against drug manufacturers, distributors and doctors. Local governments want compensation for the burden addiction puts on public safety and health services. Prosecutors, including U.S. Attorney General Jeff Sessions, want to stop and punish doctors who over-prescribe and run so-called "pill mills."

Attorneys also want to take down manufacturers they say misled physicians and consumers into thinking that extremely powerful painkillers once reserved for hospice and cancer patients had been improved to the point that they could safely be prescribed for many other types of pain.

"This is essentially like legal heroin," says Rhon Jones, a partner at the Beasley Allen law firm in Montgomery. The firm represents more than 100 local governments, mostly cities and counties, more than 90 percent of them in Alabama.

In fact, the prescription painkiller fentanyl is especially dangerous because it is far more potent than morphine or even heroin. Whether it is obtained illegally on the street or by legal medical prescription, its use can easily result in an accidental overdose.

Opioid addiction doesn't discriminate by age or socio-economic status. It can affect anyone who starts taking the painkillers, even for a temporary condition such as a broken bone or a wisdom tooth removal. If a person stays on them too long, withdrawal symptoms will develop if he or she tries to stop using them, and longer-term pain will require higher doses.

A classic example of how an addiction develops is a teenager with a knee injury who has surgery and is prescribed "a gargantuan amount of opioids," Jones says. "They get hooked, and two or three years later they're either stealing pills or doing some drug that's not prescription, and they overdose."

Local government claims are based on public nuisance law, Jones says. Suits against manufacturers such as Purdue Pharma LP, the maker of OxyContin, allege deceptive trade practices or fraudulent inducements. Manufacturer claims that opioids had been improved and were less addictive set off an increase in prescriptions, Jones says. "The vast majority of physicians were prescribing opioids that they were told by the manufacturers were OK to prescribe."



**Rhon Jones, of Beasley Allen, represents local governments as they seek recompense from drug makers.**

PHOTO BY ROBERT FOUTS

Earlier this year, Purdue Pharma announced it would stop promoting opioids to physicians.

Claims against distributors and pharmacies allege a failure to comply with their statutory duty to report orders that look suspicious, Jones says. Rural pharmacies that routinely fill extraordinarily large amounts of opioid prescriptions are one example. "The number of opioids going to small towns, small places, one pharmacy, that type of stuff, is staggering," he says.

The failure to report suspicious patterns may be one reason Alabama ended up with such a high per capita use of the drugs, he says. "There were so many pills coming into Alabama, it was spreading the epidemic."

Another possible reason cited by the state's addiction council is people leaving prison who may have abused opioids in the past getting addicted again or overdosing. The council has recommended counseling offenders before they are released about the danger of using opioids again.

Dan Martin, a partner at the Jones Walker firm in Birmingham, defends physicians, nurse practitioners and physician groups against opioid claims. He says such cases have made up most of his practice for seven or eight years, and he suggests that Alabama has more opioid use in part because of a disproportionately high number of chronic conditions among the population.

"Poor, obese, rural individuals tend to have comorbidities of chronic conditions: diabetes, COPD, joint pain, back pain, that are lifetime painful conditions for those populations," Martin says.

Patients seeking disability determinations may stay on opioids longer, inadvertently becoming addicted as they tell their doctors they are in too much pain to return to work, he says. Martin blames the length of the process of seeking disability payments.

Although pill-mill doctors and illegal drug dealing exist in Alabama, Martin says, most doctors are trying to balance the possibility of opioid dependency, treating a patient with chronic pain and being second-guessed by insurers and Medicare claims monitors.

"Lost in this debate are the patients who really are in pain and probably not happy about their opioid dependence, and the doctor who wants the patients to not be addicted to opioids but who wants to treat his patients' pain," he says.

One result of increased scrutiny is that physicians became reluctant to go outside what are considered to be the normal treatment patterns, Martin says. While physicians are now being urged to prescribe fewer opioids, they also may be asked to defend their use of other treatment options such as more physical therapy.

Martin now talks to groups of healthcare practitioners about how to deal with such scrutiny, including visits from the FBI. Pain management specialists and cardiologists are among the physicians most likely to face such challenges. Rules and regulations change so often that "nobody can reasonably be expected to keep up with all of them," he says.

"Now you have to presume that your actions as a doctor are going to be put under a microscope by someone with an incentive to find any mistake to be not a mistake but fraud."

Just saying that what a doctor did was medically necessary or that the doctor's own cryptic notes are an accurate reflection of his intentions isn't enough, Martin says.

Nationally, Sessions has created multiple task forces to fight opioid abuse and is hiring new federal prosecutors specifically to combat associated crimes. In one high-profile case in Mobile, Drs. Patrick Couch and Xiulu Ruan were sentenced last year on drug and fraud charges to 20 and 21 years in federal prison, respectively, although the original case pre-dated the Trump Administration and Sessions' appointment as attorney general.

As for the local government lawsuits, Jones says they've become part of a federal multidistrict litigation (MDL) case in Cleveland called the National Prescription Opiate Litigation. Nearly a thousand local government claims from across the country have been consolidated for purposes of discovery, so that issues such as depositions don't need to be repeated hundreds of times. The state of Alabama's lawsuit is part of the MDL.

According to Jones, one federal judge is overseeing three of the local cases on "a bellwether track." Two are local governments in Ohio and the third is the city of Chicago.

An MDL isn't the same as a class action lawsuit because the plaintiffs aren't the same group of people affected by the same injury, Jones says. Local governments have different structures and state laws are different. Some get grants that might be affected while others don't.

However, the rulings coming out of those three cases will have "tremendous bearing," on the rest of the cases, Jones says.

Because of the complexity of the issues and the cases, Jones says he doesn't expect to see Alabama cases begin to resolve until next year. MDL rulings are expected through the rest of this year.

Jones calls the opioid crisis unprecedented as it affects Alabama. "There is hardly any part of the business community, the healthcare community, that hasn't been impacted."

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**Dan Martin, of Jones Walker, helps healthcare providers deal with the scrutiny from the FBI.**