

THE WALL STREET JOURNAL.

WSJ.com

October 1, 2014, 9:00 AM ET

That Flushing Sound: Pharma Must pay for a Drug Take-Back Program

By Ed Silverman



Agence France-Presse/Getty Images

In a defeat for the pharmaceutical industry, a federal appeals court has upheld a lower-court ruling that drug makers must pay for a so-called take back program that a California county passed into law two years ago.

The Alameda County ordinance, which was the first of its kind in the nation, requires drugs makers to pay for the disposal of unused and unexpired medicines. County officials estimated the annual costs to be about \$330,000, or between \$5,300 and \$12,000 for each manufacturer, according to court documents.

Like many local governments, the county sought to reduce contaminants in drinking water and lower the threat of drug abuse stemming from painkillers that linger in household medicine chests. Disposal costs, however, can overwhelm local governments and so county officials sought to force drug makers to cover the costs.

But in [a lawsuit](#), the pharmaceutical industry's trade group claimed the ordinance violates the U.S. Constitution by interfering with interstate commerce and discriminates against out-of-state drug makers. How so? The ordinance shifts the costs on to out-of-state drug makers, which are required to pay for take-back programs based on their sales in the county.

The Pharmaceutical Research and Manufacturers of America, the industry trade group, also argued that safe disposal of unwanted medicines is a shared responsibility and that the ordinance unfairly requires drug makers to develop, manage and fund disposal operations. The trade group further warned that higher costs would, ultimately, have to be passed on to consumers.

But the Ninth U.S. Circuit Court of Appeals in San Francisco rejected the arguments. [In a 3-to-0 ruling](#), the

court maintained the ordinance treats all drug makers equally and does not place a substantial burden on interstate business.

The ordinance “applies to manufacturers that make their drugs available in Alameda County – without respect to the geographic location of the manufacturer,” and “does not directly regulate interstate commerce, because it does not control conduct beyond the boundaries of the county,” the court wrote. “... Given that the ordinance applies across the board, it does not discriminate at all.”

The court also pointed out that the pharmaceutical industry generates \$950 million a year in sales in Alameda County and could easily afford the cost of the take-back program, which the industry trade group estimated would cost drug makers about \$1.2 million annually. County officials argued that, since drug makers make money on local sales, they have an obligation to help with paying for disposal.

To what extent the decision will embolden other local governments to consider passing similar ordinances is unclear. A recent effort to pass a statewide program [failed in the California legislature](#), and a similar effort in New York has stalled.

But if “other states or counties begin to follow Alameda County, the pharmaceutical industry could be left with some serious financial burdens, which could lead companies to try to sell the majority of their prescription drugs in certain counties without these ordinances” to avoid the cost of disposal programs, attorneys at the Sedgwick law firm [wrote in a bulletin](#) last year.

The PhRMA trade group could appeal the decision to the U.S. Supreme Court.

In a statement sent to us, Mit Spears, a PhRMA executive vice president and general counsel, says that “off-loading the costs of a local take-back program on to out-of-state consumers and businesses, as is the situation in Alameda, is not an appropriate way to address any of the problems associated with the misuse of prescription medicines.”

Instead, he maintains that “in-home disposal is one of many easy options for consumers who wish to dispose of expired and unused pharmaceutical products.” As for the ruling, he says that PhRMA is “reviewing our legal options.”

[UPDATE: The Alameda County Board of Supervisors issued a statement in which Nate Miley, one supervisor, says the “decision was the right decision. We believe our Safe Disposal Drug Ordinance is fair and will set a national precedent as a new policy tool for local governments to protect public health and the environment. We have led the charge and it is my hope that the pharmaceutical industry will embrace this ruling and join us in keeping unwanted medications from causing harm such as accidental poisoning, abuse by children and teens, or ending up in our waterways.”]

Copyright 2014 Dow Jones & Company, Inc. All Rights Reserved

This copy is for your personal, non-commercial use only. Distribution and use of this material are governed by our [Subscriber Agreement](#) and by copyright law. For non-personal use or to order multiple copies, please contact Dow Jones Reprints at 1-800-843-0008 or visit www.djreprints.com