

Another Qui Tam Suit Alleging a Scheme to Defraud by Reporting Inflated Drug Prices Survives Motion to Dismiss

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by Nathan J. Ebnet

Within the last five years, district courts in the Seventh Circuit have repeatedly denied motions to dismiss *qui tam* lawsuits brought under the FCA that allege a scheme to defraud government health programs by reporting inflated “usual and customary” prices for prescription drugs. By contrast, at least one district court in the Sixth Circuit recently granted such a motion under Rule 9(b). On March 7, 2019, a district court in the Tenth Circuit—considering similar prescription drug allegations for the first time—sided with the Seventh Circuit and denied defendants’ motion to dismiss plaintiffs’ FCA claims.

In *United States ex rel. Strauser v. Stephen L. LaFrance Holdings Inc.*, plaintiffs allege that between 2008 and 2012, defendants charged cash-paying customers four dollars for a thirty-day supply of any one of more than 300 commonly prescribed generic medications. Unlike cash-paying customers, plaintiffs allege that defendants charged Medicaid beneficiaries a higher price for the same drugs and reported that higher price as the “usual and customary charge to the general public” for purposes of receiving Medicaid reimbursement. Because Medicaid bases its payments on the so-called usual and customary prices reported by the pharmacies, plaintiffs allege that defendants did not extend the same four-dollar discount pricing to Medicaid in an effort to increase their reimbursement.

In their complaint, Plaintiffs allege that defendants’ practices constituted fraudulent claims for payment under the FCA because it was understood throughout the pharmacy industry that “usual and customary charge” referred to the amount a pharmacy charged cash-paying customers. Plaintiffs also allege that defendants attempted to avoid detection by not advertising the four-dollar generic pricing in the media or through brochures, signs, or other promotional materials.

Defendants moved to dismiss plaintiffs’ FCA claims by arguing, among other things, that plaintiffs failed to plead scienter with sufficient particularity. Defendants argued that the relevant FCA provisions—*i.e.*, 31 U.S.C. § 3729(a)(1)(A), (B), and (G)—apply only to persons who act “knowingly.” Defendants argued that they could not have acted

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knowingly because excluding discount pricing of generic drugs from the usual and customary charges “was a reasonable interpretation of [an] ambiguous legal framework and not clearly proscribed by law.”

The court found defendants argument unpersuasive. The court noted that defendants’ argument was “in tension with the plain meaning of the words ‘usual and customary,’” as well as plaintiffs’ allegation that the phrase is understood throughout the pharmacy industry to refer to the amount a pharmacy charges cash-paying customers.

The court’s decision is notable in that expands the Seventh Circuit’s general acceptance of FCA claims regarding “usual and customary” prices for prescription drugs to a different jurisdiction. The court’s decision also serves as yet another win for whistleblowers complaining of fraudulent prescription drug practices and prices.

The decision is found at: *United States ex rel. Strauser v. Stephen L. LaGrance Holdings, Inc.*, 2019 U.S. Dist. LEXIS 36385 (N.D. Okla. Mar. 7, 2019).