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# 9th Circ. Revives FCA Suit Over Military Meds Deliveries

By **Rae Ann Varona**

Law360 (February 4, 2025, 11:26 PM EST) -- The Ninth Circuit on Tuesday revived a whistleblower lawsuit accusing Express Scripts Inc. of defrauding the U.S. Department of Defense out of billions of dollars in unnecessary medications for military personnel, saying the lawsuit wasn't barred by any public disclosures of the alleged fraud.

A three-judge panel at the Ninth Circuit wrote in an unpublished opinion that prescription filling practices certain sources suggested were concerning didn't trigger the False Claims Act's "public disclosure bar," which bars a whistleblower from pursuing an FCA action alleging a publicly known fraud unless they qualify as an original source.

The panel wrote that while an article by military publication Army Times cited a report that the pharmacy benefit of the Defense Department's Tricare healthcare program was wasting money by shipping unnecessary drugs or dispensing 90-day refills instead of 30-day refills, neither of the alleged practices are "substantially similar to the transactions at issue here, which involve systematically shipping needed refills too early."

Moreover, while the Army Times article recounted complaints about Express Scripts' management of mail-order drug deliveries and described beneficiaries with drugs piled up in medicine cabinets, the statements didn't infer that Express Scripts was overfilling prescriptions, the panel wrote.

"These statements suggest that some oversupplying of refills occurred, but they do not disclose any facts that would support an inference that [Express Scripts] was engaged in 'flagrant and persistent' overfilling of prescriptions, without regard to need, by deliberately using a systematic practice of shipping 90 days' worth of refills after 60 days," the panel wrote, quoting language from relator 3729 LLC's complaint.

3729 LLC was formed by a former Express Scripts pharmacist and three senior tech executives, according to its 2019 complaint filed in California federal court. According to the complaint, the pharmacist was personally responsible for all pharmacy activities at Express Scripts' mail-order pharmacy in Tempe, Arizona, where Tricare prescriptions were processed. The executives, meanwhile, had first-hand knowledge of Express Scripts' member experiences, dispensing, and business practices, and had "general pharmacy industry expertise."

The relator had alleged that from at least October 2009 until early 2018, Express Scripts submitted false claims to the Defense Department for mail-order pharmacy dispensing fees and other costs related to Tricare beneficiaries who got automatic prescription deliveries.

3729 LLC alleged that Express Scripts carried out its scheme by enrolling as many Tricare beneficiaries in automatic delivery as possible, and calibrating its pharmacy dispensing software so that a full 90-day supply of pills was dispensed every 60 days.

It further alleged that Express Scripts' management ignored patient complaints about excessive auto-refills and withheld information from the federal government by "pro-actively" ignoring or failing to report information to the Defense Department and Tricare that would have allowed the government to address the alleged fraud sooner.

The federal government declined to intervene in the suit in 2022.

Express Scripts — a subsidiary of Cigna Corp.'s Evernorth Health Inc. — moved to dismiss the lawsuit in December of that year, asserting that the lawsuit should be tossed under the False Claims Act's public disclosure bar. Express Scripts pointed the district court to both the Army Times article and allegations it said were publicly disclosed in the Federal Register through Defense Department notice-and-comment rulemaking from 2015 to 2016.

U.S. District Judge Todd W. Robinson **granted** Express Scripts' motion in June 2023, saying that while 3729 LLC's complaint provided a "greater amount of detail" than the article and the Defense Department's final rule, it didn't "materially add to the information disclosed by those sources."

Judge Robinson allowed 3729 LLC to amend its complaint. However, it declined and instead sought to appeal the decision at the Ninth Circuit.

In reversing the lower court's decision, the Ninth Circuit panel said that the comments in the Federal Register were "sufficiently vague and general" that they too applied to the two wasteful practices the Army Times article identified.

The panel wrote that the two practices asserted in the sources were "not substantially similar" to the fraud 3729 LLC alleged in its suit.

"These general comments simply do not provide enough detail to supply any basis for inferring that [Express Scripts] was engaged in a fraudulent practice that is substantially similar to deliberately sending out excessive refills too soon," the panel of judges wrote.

Roger A. Lewis of Goldberg Kohn Ltd., an attorney for 3729 LLC, told Law360 on Tuesday that they are "pleased with the court's ruling and, more importantly, with the opportunity to hold the company accountable for its mistreatment of our military's healthcare system."

Counsel for Express Scripts did not immediately respond to a request for comment on Tuesday.

U.S. Circuit Judges Richard R. Clifton, Daniel P. Collins and Kenneth Kiyul Lee sat on the panel for the Ninth Circuit.

3729 LLC is represented by David J. Chizewer and Roger A. Lewis of Goldberg Kohn Ltd. and Ross H. Hyslop of Pestotnik LLP.

Express Scripts is represented by James D. Nelson, Eric W. Sitarchuk, Ryan P. McCarthy and Jaclyn Unis Whittaker of Morgan Lewis & Bockius LLP.

The case is 3729 LLC v. Evernorth Health Inc. et al., case number 23-55645, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Jay Jackson Jr.

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