



CONTACT: Randal Johnson  
Louisiana Independent Pharmacies Association  
(225) 921-1704  
Johnson@LIPA.org

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**JUDGE DENIES EXPRESS SCRIPTS MOTION TO DISMISS LIPA LAWSUIT ABOUT  
PREEMPTION OF PROVIDER FEE**

**Judge Makes Important Ruling on Medicare Preemption; Says PBM Not Entitled to Dismissal of Lawsuit Based on Medicare Preemption Argument**

LAKE CHARLES, LA (March 8, 2021) – Judge James Cain of the U.S. District Court of Western Louisiana issued an important decision denying Express Scripts, Inc. (ESI) motion to dismiss a lawsuit brought by Louisiana Independent Pharmacies Association (LIPA) regarding ESI's failure to reimburse Louisiana independent pharmacies a 10-cent provider fee required by state law. The 10-cent provider fee is required for all prescriptions dispensed to Louisiana residents whether the pharmacy is in-state or not. The 10-cent fee, though nominal, amounts to thousands of dollars per month that ultimately fund Louisiana's Medicaid program, which is matched by federal funds. ESI's argument to dismiss hinged on the premise that Medicare pre-empts the Louisiana statute requiring ESI to reimburse the fee to pharmacists.

Judge Cain ruled that there was "little authority" to support ESI's argument of field preemption. He then turned to ESI's other preemption arguments: that the state law actually conflicted with or was inconsistent with applicable Medicare laws and regulations or whether the state laws overlapped with areas already regulated by Medicare. Judge Cain stated, "There is no express directive preventing any other party - including state governments and departments of insurance – from imposing price structures or interfering with contract negotiations." Judge Cain also determined that requirement that a plan sponsor cover the "uniformly applicable fee is too minimal an intrusion on the negotiation of contract price to show that the state's law overlaps with an area of Medicare regulation. The judge ultimately said the federal statutes and regulations did not show a basis for preemption. The judge heard oral arguments on February 25, 2021 prior to rendering his written decision.

"This is a nice victory for the State of Louisiana," said LIPA's attorney J. R. Whaley, principal at Baton Rouge-based Whaley Law Firm. "Express Scripts and other PBMs have refused to respect an earlier decision of the 19th Judicial District Court, taking the position that the state court has no authority over them or the Medicare program, which is what led LIPA to bring the suit to U.S. District Court. We are seeking a declaration as to the validity of the law affecting the funding of Louisiana's Medicaid program"

The suit was filed last summer, after Express Scripts issued a provider update in May 2020 announcing it would not reimburse pharmacies the state's mandatory 10-cent provider fee on Medicare

prescriptions. *LIPA vs. Express Scripts* seeks to determine the validity of La. R.S. § 46:2625(A)(1), a law requiring in-state and out-of-state pharmacies to collect and remit a 10-cent per prescription “provider fee” to the Louisiana Department of Health (LDH) for every prescription filled for a state resident and be reimbursed those fees from the patient’s plan sponsor. LDH allocates the aggregate pharmacy provider fees and other medical provider fees to the State’s Medicaid program. Fees collected by LDH are matched by the federal government, thus helping to fund Louisiana Medicaid.

“We were well aware when we filed this declaratory action that the issue of Medicare preemption would require thoughtful examination,” said LIPA President and CEO Randal Johnson. “Can a state legislature adopt laws that prevent predatory PBM activity in their state or will PBMs continue to hide behind Medicare, claiming blanket preemptions? For the sake of Louisiana and other states trying to create a fair and equitable environment for patients and providers, we hope to find out.”

The decision to deny ESI’s motion comes as states like Louisiana begin to grapple with the extent to which they can regulate the practices of pharmacy benefit managers (PBMs) that affect Medicare, Medicaid and self-funded insurance plans. PBMs have come under fire in recent years as studies and investigations uncover predatory practices including retaining drug maker rebates instead of passing savings to patients, steering patients to PBM-owned pharmacies, and engaging in spread pricing.

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