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

**Judge Cites Express Scripts' Failure to Meet Burden of Evidence of Medicare Pre-Emption; Rules  
PBM Must Pay the 10-Cent Provider Fee Per Louisiana Law**

LAKE CHARLES, LA (March 5, 2021) – Judge James Cain of the U.S. District Court of Western Louisiana today issued a decision to deny 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.

Stating in his ruling, "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 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 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 the 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."

Although the PBM's motion was denied, the matter of the state's 10-cent provider fee is far from decided. ESI is expected to argue that federal Medicare statutes legally shield PBMs from reimbursing the 10-cent provider fee, which 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. Louisiana pharmacies have been forced to pay the provider fee or fall out of compliance with state law. ESI's argument to dismiss hinged on the premise that Medicare language pre-empts the Louisiana statute requiring the reimbursement.

The decision to deny ESI's motion comes as states like Louisiana begin to grapple with the extent to which they can regulate pharmacy benefit managers (PBMs) like ESI in order to protect patients, plan payers and pharmacies from certain predatory practices. PBMs first came to national attention following the 2017 EpiPen pricing scandal, when it was revealed that PBM fees and rebates had resulted in nearly doubling the drug's price, making it inaccessible to the patients who needed it most.

“We were well aware when we filed 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 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. Under state law, if the PBM does not pay the fee, the pharmacy must pay or risk falling out of compliance with state regulation. *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. 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.

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