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Omnicare and CVS's "Novel" Argument Fails to Defeat FCA Claims

April 1, 2021 – FCA Now
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On March 19, 2021, a Southern District of New York judge denied a motion to dismiss a False Claims Act ("FCA") suit alleging that Omnicare—a subsidiary of CVS Health Corp.—"dispensed drugs based on invalid prescriptions to potentially tens of thousands of individuals living at more than 3,000 residential facilities." *See United States ex rel. Bassan v. Omnicare, Inc.*, No. 1:15-cv-4179 (CM), 2021 U.S. Dist. LEXIS 52323 *3 (S.D.N.Y. Mar. 19, 2021). The long-pending suit, which was originally brought by qui tam relator Uri Bassan in 2015, alleges that Omnicare consistently issued prescriptions to individuals in long-term care facilities that were not supported by valid prescriptions between 2010 and 2018.

The Court explained that the defendants' motion "present[ed] what can only be described as a novel reason why the Government's pleading is insufficiently particular." *Id*. at *27. The "novel" argument was that the regulation upon which the Government relied to demonstrate that filling invalid prescriptions was illegal took effect on January 1, 2013, rendering the prior alleged conduct of dispensing prescription drugs without a prescription legal. The Court denied the motion on three bases.

First, the Court explained that the Government's pre-2013 claims arose under three different government insurance programs and the regulation at the core of the defendants' argument only concerned one. As a result, the Court determined that the allegations related to the two other programs precluded dismissal of the pre-2013 claims.

Second, the court reasoned that because the Government was able to show in detail that Omnicare's Medicare reimbursements after January 1, 2013 were also the product of alleged false claims, the claim could not be dismissed in full.

Third, the Court, relying on several regulations and guidance materials, "reject[ed] Omnicare's suggestion that it was perfectly legal to dispense drugs paid for by Medicare without a valid prescription prior to 2013." *Id*. at *28-29. To do so, the Court first cited to Centers for Medicare and Medicaid Services regulatory guidance pre-dating 2013 which

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provided that "we have consistently maintained that drugs cannot be eligible for [Medicare] coverage unless they are dispensed upon prescriptions that are valid under applicable State law." *Id*. at 28-29 (citing 76 Fed. Reg. 63,018, 63,059 (Oct. 11, 2011). The Court also relied on other federal statutory schemes such as the Federal Food Drug and Cosmetic Act, which described a prescription drug as one that can only be dispensed upon a valid prescription. *See* 21 U.S.C. § 353(b)(1).

This case is a reminder that the litigation of alleged false claims spanning several years can often be impacted by the different statutory schemes and regulations that are in effect, or not in effect, over the course of the alleged false claims.