

Report on Medicare Compliance Volume 31, Number 36. October 03, 2022 FCA Lawsuit Over Patient Gift Cards Survives Motion to Dismiss

By Nina Youngstrom

A False Claims Act (FCA) lawsuit alleging that certain patient gift cards were kickbacks survived a motion to dismiss Sept. 26.

The lawsuit was filed by a whistleblower, 72-year-old retired Florida physician Niles Rosen, against Exact Sciences Corp. (ESC) and its subsidiary, Exact Sciences Laboratories LLC (ESL), which administers Cologuard, a colon cancer screening test.^[1] Rosen alleges that a \$75 Visa reward card offered to him and other Medicare beneficiaries as part of Exact Sciences' Patient Compliance Program was unlawful remuneration intended to induce their use of Cologuard. In 2018, "Medicare paid defendants more than \$160 million for Cologuard tests while defendants were offering unlawful cash equivalent inducements directly to government beneficiaries," according to the complaint. The subsequent claims submitted to Medicare by Exact Sciences violated the FCA because they were "tainted," the complaint alleges.

"It was a straight-up kickback," contends attorney Marlan Wilbanks, who represents the whistleblower. "You can't offer cash or cash equivalents to anyone to induce them to use a government service."

In its motion to dismiss the complaint, Exact Sciences refuted the allegations and asserted, among other things, that the arrangement qualifies for the preventive care safe harbor to the Anti-Kickback Statute (AKS) and that the complaint fails for many reasons, including the whistleblower's inability to "adequately allege that Exact Sciences knowingly and willfully violated the law."^[2] For now, though, the case is proceeding because a federal judge denied the motion to dismiss.^[3]

The Department of Justice declined to intervene in the complaint.

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