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PharMerica FCA Decision Is A Win For Statutory Interpretation

By **David Lieberman and Erica Hitchings** (March 2, 2020, 4:14 PM EST)

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On Feb. 19, the U.S. Court of Appeals for the First Circuit issued a decision in U.S. ex rel. Banigan & Templin v. PharMerica Inc., a long-running False Claims Act suit.[1] The plaintiffs allege that PharMerica, one of the largest long-term care pharmacy companies in the U.S., illegally used kickbacks to induce nursing homes to purchase its drugs.

As detailed below, the First Circuit's decision delivers an immediate victory to the whistleblower who may now pursue his claims, over 12 years after the initial complaint was filed. As such, it is also a victory for the federal government and taxpayers, on whose behalf the relator is litigating.

But the impact of the decision extends beyond this single (albeit significant) suit, as the First Circuit has made clear that the text of the FCA, in this case the so-called original-source provision, must be interpreted with the statute's structure and purpose in mind.

A Brief History of the False Claims Act, Public Disclosure Bar and Original Source Exception

The FCA[2] is the federal government's primary tool for combating fraud against itself. Sometimes referred to as "Lincoln's Law," Congress initially enacted the FCA to stop fraud perpetrated against the Union army by unscrupulous military contractors during the Civil War.

A key feature of the law is the qui tam or whistleblower provision. This allows private citizens, called relators, to sue on behalf of the government and receive a portion of the recovery.[3] In recent years, whistleblower actions have accounted for the lion's share of government fraud recovery. In 2019, nearly 70% of the $3 billion plus recovered by the U.S. Department of Justice was attributable to whistleblower actions.[4]

At the heart of the First Circuit's recent decision in PharMerica is the question of who qualifies as a relator, specifically how courts should interpret the public disclosure bar and its exception for original sources.[5]

In its original form, the FCA permitted any individual to bring a qui tam suit regardless of the source of the person's information. As the Senate sponsor explained in 1863, even a government prosecutor "who is required to be vigilant in the prosecution of such cases, may be also the informer, and entitle himself to" a relator's share.[6]

This, however, gave rise to parasitic suits filed by parties who "merely plagiarized information in indictments returned in the courts, newspaper stories or congressional investigations."[7]

The U.S. Supreme Court confronted this issue in 1943, in U.S. ex rel. Marcus v. Hess, concluding that parasitic suits were permitted under the language of the statute.[8] In response, Congress amended the law to add what was then known as the "government knowledge bar" that prevented actions

"based upon evidence or information in the possession of the United States."[9]

By the 1980s, however, it was clear that this change cut too far and significantly inhibited the FCA's effectiveness at rooting out fraud.[10] Accordingly, in 1986, Congress, led by Sen. Charles Grassley, R-Iowa, introduced significant revisions that became the core of the modern FCA.

The 1986 amendments replaced the government knowledge bar with a "public disclosure bar," more narrowly drawn "to strike a balance between encouraging private persons to root out fraud and stifling parasitic lawsuits such as the one in Hess."[11]

The 1986 public disclosure bar applied to suits based upon allegations or transactions disclosed publicly in a criminal, civil or administrative proceeding, a government report, or from the news media, unless the person bringing the action was an original source of the information.[12]

The statute defined "original source" as an "individual who has direct and independent knowledge of the information on which the allegations are based."[13] This is the provision at issue in PharMerica.

Notably, in 2010, Congress determined that courts had applied the public disclosure bar too broadly, and the original source exception too narrowly. It further amended the statute to expand the category of persons who qualify as original sources to include individuals with "knowledge that is independent of and materially adds to the publicly disclosed allegations or transaction."[14]

The 2010 amendments reflect Congress' frustration that erroneous judicial interpretations of the public disclosure bar and original source exception resulted in the dismissal of "real meritorious cases" that the the government would never have "brought but for the qui tam action pointing the [g]overnment to the fraud."[15]

Notably the First Circuit relied on this 2010 legislative history in its PharMerica opinion.[16] Thus, while the First Circuit's PharMerica opinion interprets the 1986 amendments, the decision's fidelity to the text and purpose of the law and the court's reliance upon the 2010 legislative history suggest that it will have a lasting impact on the interpretation of the original-source provision.

Factual and Procedural History

In 2007, relators James Banigan and Richard Templin filed an FCA lawsuit in the U.S. District Court for the District of Massachusetts, alleging that their former employer (the pharmaceutical company Organon USA Inc.) devised a plan to pay kickbacks to long-term care pharmacies, including PharMerica, to prescribe two of Organon's antidepressant medications.[17]

Specifically, the relators alleged that Organon offered illegal discounts and rebates designed to give PharMerica incentive to switch patients' prescriptions from other manufacturers' drugs to Organon products.[18]

Banigan and Templin were members of the leadership team within the same department as the individuals who devised the fraud, Carroll McKenna and John Maddox. Banigan received emails from Maddox that proposed marketing the drugs based on the kickbacks.[19]

Later, Maddox and McKenna approached Banigan directly about the scheme. McKenna explained that he considered the information about the fraud his insurance policy that he could use against Organon if the company tried to force him out."[20]

Later, Templin, who succeeded Banigan in his role, learned of the scheme from Maddox and McKenna. Maddox told Templin about the existence of a noncompliant program that provided him with a get-out-of-jail-free card with Organon.[21] Banigan and Templin found marketing materials and contracts that substantiated the fraudulent scheme described to them by the perpetrators.

In 2010, after investigation, the U.S. declined to intervene in the litigation, and the relators began to litigate on the government's behalf.

In 2012, the district court dismissed most of the relators' claims as barred by the public disclosure bar because the allegations were substantially similar to those within an earlier federal qui tam suit

filed against PharMerica.[22] Notably, the court did not consider whether the relators qualified as an original source.

The relators moved for reconsideration. The district court deferred decision on that motion until 2018 while the relators pursued claims against other defendants, ultimately securing two separate settlements.[23]

In 2018, the district court resolved the motion, rejecting the relators' contention that they were original sources under the FCA. It concluded that neither relator had direct knowledge as required under the statute.[24]

The court read "direct knowledge" to require knowledge of the fraud obtained during its pendency and in the regular course of one's work.[25] In so concluding, the court emphasized that neither relator saw "any of the corroborating documents until more than a year after the scheme concluded, and even then not in the regular course of his job duties."[26]

The First Circuit Rejects the District Court's Crabbed Reading of "Original Source"

On appeal, the First Circuit agreed with the district court's conclusion that these allegations were sufficiently similar to come within the public disclosure bar's prohibitions. The version of the public disclosure bar at issue in PharMerica prohibited all suits based upon allegations in an earlier lawsuit.

The court acknowledged that the relators' allegations were not derived from the earlier suit. But it noted that courts have long rejected the plain textual meaning of "based upon" to include allegations that are sufficiently similar to earlier information.[27]

However, the First Circuit parted ways with the district court, concluding that Banigan's knowledge was, in fact, direct, and he was therefore an original source entitled to pursue claims on behalf of the government.[28] The First Circuit noted the dictionary defines direct as "marked by absence of an intervening agency, instrumentality, or influence: immediate."[29]

But this still left the question as to whether that language limits an original source those who contemporaneously participate or observe the fraud, as the district court had held.

The First Circuit rejected the district court's interpretation of the term direct, explaining unequivocally that the contemporaneous requirement "finds no support in the text of the FCA and would only discourage reports of fraud."[30]

This was, the court of appeals found, because "nothing in the statutory text limits 'direct knowledge' to knowledge gained from participation in or observation of the fraud," rather the only requirement is "that the person have 'direct and independent knowledge of the information on which the allegations are based,' not direct and independent knowledge of the fraudulent acts themselves.""[31]

PharMerica Puts Front and Center the Question of Who Is a Proper Relator Under the FCA

The facts in PharMerica highlight how the defendant's interpretation of original source, adopted by district court, drastically departs from the intent and structure of the FCA. As detailed above, Banigan was a corporate insider who received emails from the perpetrators alerting him to the scheme and obtained corroborating documents establishing it.[32]

Indeed, while taking pains to note that corporate insiders are not the only individuals who qualify as relators or original sources under the law,[33] the First Circuit emphasized that "Banigan would seem to be the most likely type of person to function as an original source."[34]

In its original incarnation in 1863, the FCA sought to reward anyone with information about fraud. The public disclosure bar was later imposed to preclude only "'parasitic' qui tam actions in which relators, rather than bringing to light independently discovered information of fraud, simply feed off of previous disclosures of fraud."[35] But there is nothing opportunistic or parasitic about the allegations here.

As the First Circuit emphasized, the defendant's (and the district court's) interpretation of direct

would "require a relator to have participated in the fraud or observed it in operation ... and would exclude a relator who discovered the fraud after the fact and brought it to the government's attention."[36]

This would paradoxically limit permissible relators to those like Maddox and McKenna, who not only planned, initiated and perpetrated the fraud, but who, in this case, intentionally held proof of it as a get-out-of-jail-free card. [37]

Such a result is plainly contrary to the purpose of the law. As the appeals court noted:

> We do not think that Congress intended to reward as original sources only those who participated in the fraud.[38]

These concerns are not hypothetical or unrealistic. Indeed, the First Circuit's opinion criticized other circuits that have used this implausible rationale to limit the original-source provision to those with first-hand knowledge of the fraud.[39]

In particular, the court took strong issue with a decision of the U.S. Court of Appeals for the Eleventh Circuit, that a relator did not qualify as an original source because he worked in a different department than the perpetrators and only learned of the fraud by being directly informed of it from his managers.[40]

In sum, the First Circuit got it right — such a narrow interpretation is "incompatible with a core purpose of the FCA — to incentivize disclosures of fraudulent activity underlying claims for reimbursement from the government."[41] As it succinctly and powerfully concluded, "Congress's attempt to preclude parasitic claims need not preclude claims by whistleblowers."[42]

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[1] U.S. ex rel. Banigan v. PharMerica Inc., No. 18-1487, 2020 WL 813258, at *2 (1st Cir. Feb. 19, 2020).

[2] 31 U.S.C. §§ 3729, et seq.

[3] 31 U.S.C. § 3730(b).

[4] DOJ, Fraud Statistics - October 1, 1986 - September 30, 2019, https://www.justice.gov/opa/press-release/file/1233201/download

[5] 31 U.S.C. § 3730(e)(4)(A).

[6] Congressional Globe, 37th Cong., 3rd Sess., 955-56.

[7] U.S. v. Burmah Oil Co. Ltd., 558 F.2d 43, 46 n.1 (2d Cir. 1977).

[8] U. S. ex rel. Marcus v. Hess, 317 U.S. 537, 546-48 (1943)

[9] Act of December 23, 1943, ch. 377, 57 Stat. 608, codified as amended at 31 U.S.C.A. §§ 232 to 235 (1976).

[10]Claire M. Sylvia, The False Claims Act: Fraud Against the Government § 2:9. Development in the United States — 1986 Amendments.

[11] Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson, 559 U.S. 280, 295 (2010).

[12] 31 U.S.C. § 3730(e)(4)(A) (1994).

[13] 31 U.S.C. § 3730(e)(4)(A) (1994).

[14] 31 U.S.C. § 3730(e)(4)(A) (2010).

[15] S. Rep. No. 110-507, at 22 (2008).

[16] U.S. ex rel. Banigan v. PharMerica, Inc., No. 18-1487, 2020 WL 813258, at *9 n.16 (1st Cir. Feb. 19, 2020).

[17] Long-term care pharmacies like PharMerica stock and dispense the medications and supplies that are used in nursing homes nationwide and thus "exert considerable influence over the choice of medications" used in those facilities. This makes them a natural focal point of pharmaceutical companies that are seeking to maintain or gain market share in nursing homes and other long-term care facilities. U.S. ex rel. Banigan v. PharMerica, Inc., No. 18-1487, 2020 WL 813258, at *2 (1st Cir. Feb. 19, 2020). It is this relationship – between a pharmaceutical company and PharMerica – that is the focus of Relators' allegations.

[18] U.S. ex rel. Banigan v. PharMerica, Inc., No. 18-1487, 2020 WL 813258, at *3 (1st Cir. Feb. 19, 2020)

[19] Id. at *4.

[20] Id.

[21] Id.

[22] U.S. ex rel. Banigan v. Organon USA Inc., 883 F. Supp. 2d 277, 288-290 (D. Mass. 2012)). See U.S. ex rel. St. John La Corte v. Amerisource Bergen Corp. and PharMerica, Inc., No. 02–3168 (E.D.La.)

[23] U.S. ex rel. Banigan v. PharMerica, Inc., No. 18-1487, 2020 WL 813258, at *6 (1st Cir. Feb. 19, 2020).

[24] U.S. ex rel. Banigan v. PharMerica, Inc., No. CV 07-12153-RWZ, 2018 WL 2012684, at *4–5 (D. Mass. Apr. 30, 2018), rev'd and remanded, No. 18-1487, 2020 WL 813258 (1st Cir. Feb. 19, 2020)

[25] Id. at *4.

[26] Id.

[27] U.S. ex rel. Banigan v. PharMerica, Inc., No. 18-1487, 2020 WL 813258, at *7 n.11 (1st Cir. Feb. 19, 2020). Moreover, this interpretation of "based upon" was directly criticized by Congress in amending the statute. See S. Rep. No. 110-507, at 23 (2008) (identifying as contrary to the intent of congress, court's "finding the public disclosure bar applies to bar cases that are 'similar to' rather than the statutorily required standard of 'derived from' information in the public domain.").

[28] The First Circuit noted that the relators' argument focused on Banigan's status as an "original source" and that they did not respond to PharMerica's contention that Templin's claims must be dismissed even if Banigan's survived. Accordingly, the First Circuit ordered the dismissal of Templin as a relator even as it saved Banigan's claims. U.S. ex rel. Banigan v. PharMerica, Inc., No. 18-1487, 2020 WL 813258, at *8 n. 14 (1st Cir. Feb. 19, 2020).

[29] Id. *8 (quoting U.S. ex rel. Ondis v. City of Woonsocket , 587 F.3d 49, 59 (1st Cir. 2009)).

[30] Id. at *10.

[31] Id. at *9 (quoting 31 U.S.C. § 3730(e)(4)(B)) (emphasis in First Circuit opinion).

[32] Id. at *10.

[33] Id. at *10 n.17.

[34] Id. at *10.

[35] U.S. ex rel. Duxbury v. Ortho Biotech Prod. LP, 579 F.3d 13, 26 (1st Cir. 2009) (quoting U.S. ex rel. McKenzie v. BellSouth Telecomms. Inc., 123 F.3d 943 (6th Cir.1997)).

[36] U.S. ex rel. Banigan v. PharMerica, Inc., No. 18-1487, 2020 WL 813258, at *9 (1st Cir. Feb. 19, 2020).

[37] Id. at *4.

[38] Id. at *10.

[39] Id. at *9 n.15; see U.S. ex rel. Saldivar v. Fresenius Med. Care Holdings Inc., 841 F.3d 927, 936 (11th Cir. 2016).

[40] U.S. ex rel. Saldivar v. Fresenius Med. Care Holdings Inc., 841 F.3d 927, 936 (11th Cir. 2016).

[41] U.S. ex rel. Banigan v. PharMerica, Inc., No. 18-1487, 2020 WL 813258, at *9 (1st Cir. Feb. 19, 2020).

[42] Id. at *10.