

Third Circuit Rejects District Court’s Application of FCA’s Public Disclosure Bar, Reviving Relator’s Qui Tam Action

PG Bulletin

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In 2011, Relator Marc Silver, a former owner of a nursing home and pharmacy, sued PharMerica Corporation and others in the name of the United States under the qui tam provisions of the federal False Claims Act (FCA), as well as in the name of 27 states and the District of Columbia under their state false claims acts.¹ Silver alleged that the defendants engaged in a practice known as “swapping” in violation of the federal Anti-Kickback Statute (AKS) and various state anti-kickback statutes.

According to the complaint, swapping is where a pharmacy offers discounted rates on a nursing home’s expenses for providing care to Medicare Part A patients in exchange for securing the nursing home’s Medicaid and Medicare Part D business. Silver alleged that swapping violates the AKS because the discounts to a nursing home’s Part A rates can be considered illegal remuneration when a pharmacy offers the lower rates for the purpose of inducing referrals for business reimbursed by Medicaid and Medicare Part D. Silver specifically alleged that PharMerica offered \$8-10 per-diem rates to nursing homes for Part A patients and that PharMerica was willing to lose money on the Part A rates in order to secure the nursing homes’ Medicaid and Part D business.

After an investigation, the Department of Justice and all 27 states and the District of Columbia declined to intervene in the case. On November 28, 2016, the district court granted PharMerica’s motions to dismiss and for summary judgment pursuant to the FCA’s public disclosure bar.² Silver appealed, and on September 4, 2018, the Third Circuit held that the district court erred in its application of the FCA’s public disclosure bar and reversed and remanded the case.³

The FCA’s public disclosure bar is found at 31 U.S.C. § 3730(e)(4)(A). Prior to the passage of the Patient Protection and Affordable Care Act (PPACA), the public disclosure bar was jurisdictional in nature and provided that “[n]o court shall have jurisdiction over an action under [the FCA] based on the public disclosure of allegations or transactions . . . unless . . . the person bringing the action is an original source of the information.”⁴ Effective March 23, 2010, however, the PPACA amended the FCA’s public disclosure bar so that it is no longer jurisdictional in nature, and now section 3730(e)(4)(A) provides that a “court shall dismiss an action or claim under [the FCA] . . . if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed . . . unless . . . the person bringing the action is an original source of the information.”

The Third Circuit has held that the public disclosure bar can be triggered by either a public “allegation” of fraud that is a specific assertion of wrongdoing, or a “transaction” that raises an inference of fraud.⁵ The Third Circuit has adopted the following formula to represent when information publicly disclosed in a specified source qualifies as an allegation or transaction of fraud:

If X + Y = Z, Z represents the allegation of fraud and X and Y represent its essential elements. In order to disclose the fraudulent transaction publicly, the combination of X and Y must be revealed, from which readers or listeners may infer Z, i.e., the conclusion that fraud has been committed.⁶

"The essential elements of the allegation of fraud [Z] are 'a misrepresented [X] and a true [Y] state of facts.' . . . Thus, the public disclosure bar applies 'if either Z (fraud) or both X (misrepresented facts) and Y (true facts) are [publicly] disclosed by way of a listed source."⁷

In its motions, PharMerica argued that the public disclosure bar applied to prevent Silver's qui tam action because the two elements of the allegedly fraudulent transaction were sufficiently revealed in publicly available sources. In granting PharMerica's motions, the district court agreed that such inference of the alleged fraudulent transaction could be made for two reasons: (1) the general risk of swapping was known in the nursing home industry; and (2) Silver, in his deposition, relied on publicly available documents and did not independently review whether such public sources sufficiently disclosed the alleged fraud.

On appeal, the Third Circuit considered whether the X element (i.e., allegations of PharMerica's misrepresentation of its compliance with the AKS), and Y element (i.e., allegations that PharMerica was truly not in noncompliance), had both been sufficiently disclosed in publicly available sources to infer the existence of the Z (i.e., PharMerica's alleged fraudulent transaction). The Third Circuit agreed that the X element in the equation was present because nobody disputed that PharMerica had publicly represented that it had complied with the AKS. Thus, the issue hinged on whether the Y element was also present to sufficiently trigger the FCA's public disclosure bar.

The district court had determined that the Y element was sufficiently present because the alleged fraudulent transactions were cumulatively disclosed in various reports that addressed the general risks of swapping in the nursing home industry. Such reports included:

- A 1999 advisory opinion by the Health and Human Services Office of Inspector General (HHS-OIG);
- A 2000 HHS-OIG "Compliance Program Guidance for Nursing Facilities";
- A 2008 HHS-OIG "Supplemental Compliance Program Guidance for Nursing Facilities";
- A 2004 report by the Lewin Group commissioned by the Centers for Medicare and Medicaid Services;
- 2007 reports by the Harvard Medical School and Medicare Payment Advisory Commission; and
- PharMerica's Form 10-k financial disclosures.

The Third Circuit considered these documents and concluded that none "of the documents, alone or considered together with the rest of the public documents, disclose the fraudulent transactions that Silver alleges, not least of which because the documents do not point to any specific fraudulent transactions directly attributable to PharMerica."⁸

The Third Circuit further held that the district court's heavy reliance on PharMerica's 10-K disclosure was misplaced: "[a]t no point did the District Court elucidate what information in the 10-K forms disclosed or suggested that PharMerica was engaged in swapping or how anyone could use the 10-k data in conjunction with information from the other public sources to reach such a conclusion."⁹ The Third Circuit noted that although Silver did rely on information from PharMerica's 10-K in his deposition, such information was not dispositive in enabling him to deduce the alleged fraudulent transaction. Instead, "[t]he crux of Silver's allegation is that the \$8-10 per-diem rates that he discovered must have been below-cost (and so violate the [AKS])."¹⁰ The Third Circuit explained that "Silver's more concrete claim, which set out specific facts suggesting that PharMerica in particular was actually engaged in swapping, relied upon these general disclosures but could not have been derived from them absent Silver's addition of the non-public per-diem information."¹¹

Accordingly, the Third Circuit concluded that the district court erred in concluding that the Y element was present to trigger the FCA's public disclosure bar. As such, it reversed the district court's granting of PharMerica's motions to dismiss and for summary judgment, thereby reviving Silver's qui tam action.

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¹ *United States ex rel. Silver v. Omnicare, Inc.*, Case No. 1:11-cv-01326 (D.N.J. 2011).

² See *United States ex rel. Silver v. Omnicare, Inc.*, 222 F. Supp. 3d 391, 405 (D.N.J. 2016).

³ *United States ex rel. Silver v. Omnicare, Inc.*, 903 F.3d 78, 81 (3d Cir. 2018).

⁴ 31 U.S.C. § 3730(e)(4)(A) (2006) (emphasis added).

⁵ See e.g., *United States ex rel. Dunleavy v. Cty. of Del.*, 123 F.3d 734, 741 (3d Cir. 1997), abrogated on other grounds by *Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, (2010); *U.S. ex rel. Moore & Co., P.A. v. Majestic Blue Fisheries, LLC*, 812 F.3d 294, 303 (3d Cir. 2016).

⁶ *United States ex rel. Zizic v. Q2Administrators, LLC*, 728 F.3d 228, 236 (3d Cir. 2013).

⁷ *Id.* (internal citations omitted).

⁸ *United States ex rel. Silver v. Omnicare, Inc.*, 903 F.3d at 86 (3d Cir. 2018).

⁹ *Id.* at 88.

¹⁰ *Id.*

¹¹ *Id.* at 86.

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