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1st Circ. Revives Worker's FCA Claims Against PharMerica

By **Dave Simpson**

Law360 (February 19, 2020, 10:35 PM EST) -- The First Circuit revived a 13-year-old False Claims Act suit against nursing home pharmacy chain PharMerica Corp., ruling Wednesday that, contrary to the lower court's finding, the Organon USA Inc. worker had direct knowledge of the alleged kickback scheme.

In a unanimous, published decision penned by U.S. Circuit Judge Kermit V. Lipez, the panel found that relator James Banigan was not in fact barred from the case by the public disclosure tenet of the FCA, because he had direct knowledge of the Medicaid scheme he claimed his pharmaceutical company employer enjoyed with PharMerica and Omnicare Inc., another long-term care pharmacy provider.

Banigan became aware of the fraud through emails and conversations he had with the architects and primary perpetrators of the alleged scheme, as well as through documents he dug up on his own, the panel said. There was no "intervening agency, instrumentality, or influence" between those sources and Banigan's understanding of the scheme, the panel said.

"We do not think that Congress intended to reward as original sources only those who participated in the fraud," the panel said. "Indeed, Banigan would seem to be the most likely type of person to function as an original source. Congress's attempt to preclude parasitic claims need not preclude claims by whistleblowers."

The public disclosure tenet of the FCA holds that once fraud allegations have entered the public domain, only the original source of the allegations can bring a qui tam suit.

In 2012, U.S. District Judge Rya W. Zobel tossed all federal, two municipal and 18 state claims. Banigan and another relator subsequently agreed to drop six additional state law allegations and settled **with Organon for \$31 million** and **with Omnicare for \$23 million**.

The federal government opted not to intervene.

PharMerica, which was acquired in 2017 by private equity giant KKR & Co. and pharmaceutical holding company Walgreens Boots Alliance Inc., argued in a renewed motion to dismiss that, if considered kickbacks, the claims were precluded by statutes of limitations and the fact that the issues they raised had already been made public.

In April 2018, Judge Zobel **granted PharMerica's motion to dismiss** the final three claims in the case, which contended PharMerica broke state anti-kickback laws in Louisiana, Michigan and Texas when it accepted discounts from Organon between 1999 and 2005 and, allegedly in return, granted "preferred status" to its antidepressant Remeron.

Banigan and the other relator, who is no longer in the case, managed government accounts at Organon and worked to ensure the company's drugs were on Medicaid formularies. Judge Zobel explained in her order that they each heard through the grapevine at work that there were legal

risks associated with the company's marketing scheme. But neither saw the marketing materials themselves and did not investigate further, she said.

"Because neither relator had direct knowledge, neither qualifies as an original source, and their FCA action is therefore precluded under the public disclosure bar," Judge Zobel wrote in her order. "Each of the remaining three state claims contains a public disclosure bar undisputed to be 'nearly identical' to the FCA's."

But on Wednesday, the panel disagreed.

"As required by the statute, the allegations of fraud in the complaint are based upon Banigan's direct knowledge," the panel said. "The complaint uses the first Maddox email, sent in 2000, to mark the moment when the idea to market Remeron Tablet based on profit potential was born."

Banigan's attorney, Joel Androphy of Berg & Androphy, noted that the case was originally filed in 2007.

"Relators and counsel are still alive and fighting," he told Law360 in an email.

Representatives for PharMerica did not immediately respond to requests for comment Wednesday.

U.S. Circuit Judges Kermit V. Lipez, William J. Kayatta and Juan R. Torruella sat on the panel.

The relators are represented by Zenobia Harris Bivens, Joel Androphy and Michael Hurta of Berg & Androphy.

PharMerica is represented by Benjamin M. McGovern of Holland & Knight LLP.

The case is U.S. ex rel. James Banigan and Richard Templin et al. v. PharMerica Inc., case number 18-1487, in the U.S. Court of Appeals for the First Circuit.

--Editing by Breda Lund.