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Third Circuit Clarifies Public Disclosure Bar in False Claims Act

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In *United States v. Omnicare, Inc.*, the Third Circuit clarified the operation of the public disclosure bar in the False Claims Act (FCA). The court held that publicly available information "could not have reasonably or plausibly supported an inference" of fraud. This information included government reports of known fraud schemes and a 10-k financial disclosure by the defendant company. The Third Circuit rejected application of the bar because the relator used non-public information to "make sense of publicly available information."

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Antitrust & Trade Regulation
Government Contracts, Maritime & Military Law
Health Law & Managed Care
Litigation / Trial Practice
3rd Circuit (incl. bankruptcy)

Relator Alleges Swapping

In this matter, the relator alleged that the defendant, PharMerica, unlawfully discounted prices to supply prescriptions to Medicare Part A patients in nursing homes. The government reimburses nursing homes for these patients on a fixed per diem rate that covers all services including prescriptions. The discount allegedly induced nursing homes to give the defendant contracts to supply prescriptions to patients covered by Medicare Part D and Medicaid – which are reimbursed on a cost basis. As the Third Circuit noted, this practice is known as "swapping." According to the relator, the defendant agreed with nursing homes "to provide drugs to Part A patients at per-diem rates that were so low … that they must have been below cost, in exchange for the right to service the nursing home's other residents at the market rate." The relator claimed that such swapping violated the Anti-Kickback statute. His FCA complaint alleged that the defendant fraudulently billed the government by "falsely certifying in its reimbursement claims that it was complying with the Anti-Kickback rules."

District Court Dismissal Based on Disclosure Bar

The district court, however, dismissed the claims, deeming them barred by the FCA's public disclosure bar. The public disclosure bar usually prohibits *qui tam* actions that rely on allegations of which the public already has knowledge. *See* 31 U.S.C. § 3730(e)(4) ("A court shall dismiss an action or claim under this section … if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed—(i) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party; (ii) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or (iii) from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.").

Relator Argues Bar Does Not Apply

The relator argued on appeal that public disclosures concerning the general risk of swapping in the nursing home industry did not bar his specific allegations. He claimed he supported his allegations with non-public information gleaned from non-public contracts. He further asserted that the district court should have independently reviewed whether the public documents the relator relied upon sufficiently disclosed the alleged fraud.

The district court had dismissed the lawsuit because multiple reports "cumulatively disclosed the alleged fraudulent transactions." These reports included

- 1999 Health and Human Services ("HHS") advisory opinion about an ambulance company offering discounts to a nursing home,
- 2000 HHS guidance defining swapping,
- 2008 HHS guidance noting that swapping violates the Anti-Kickback statute,
- 2004 report commissioned by the CMS that discussed interactions between nursing homes and pharmacies,
- and the defendant's Form 10-k financial disclosures.

The 10-k disclosures provided aggregate information about PharMerica's costs, gross profits, and bottom line. The relator used that aggregated information to support his conclusion that PharMerica had engaged in swapping. However, the district court did not clarify how anyone could have used the 10-k data alongside information from other public sources to reach a conclusion about swapping.

Reversed and Remanded

The Third Circuit found that none of the documents, alone or considered together, disclosed the defendant's alleged fraudulent transactions. The court specified that "the documents do not point to any specific fraudulent transactions directly attributable to PharMerica." Instead, "the documents merely indicate the possibility that such a fraud could be perpetrated in the nursing home industry." This possibility clearly fell short of the standard for pleading fraud under Federal Rule of Civil Procedure 9(b), which requires that "a party must state with particularity the circumstances constituting fraud or mistake."

The Third Circuit also disagreed with the district court and defendant's reliance on the 2004 report for CMS. The court held that, rather than publicly disclosing the prevalence of or concern about swapping, the report instead indicated that the government knew "that pharmacies offered low-cost services bundled with their provision of drugs and services to Medicaid patients and that it hoped those low-cost services could continue after the transition to Part D."

As for the relevance of the defendant's financial information in its 10-k, the Third Circuit noted that the relator still had to know the defendant's per-diem rate. "No one contends that this rate was publicly disclosed." The relator's "private knowledge of PharMerica's per-diem rates was the key to uncovering the fraud."

Concluding that the relator's allegations of fraud were not publicly disclosed, the Third Circuit reversed and remanded.