

# Triggering the Public Disclosure Bar: It's in the Details

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On February 5, the U.S. District Court for the Eastern District of Pennsylvania rejected a defendant's public disclosure bar defense, allowing the relators to proceed with their *qui tam* action under the False Claims Act. *Sturgeon, et al., v. PharMerica Corp.*, No. 15-cv-6829, 2020 WL 586978, at \*1 (E.D. Pa. Feb. 5, 2020). In denying defendant PharAmerica's motion to dismiss, the Court explained why the FCA's public disclosure bar under 31 U.S.C. § 3730(e)(4)(A)—which generally shields defendants from liability when a relator's allegations have already been publicly disclosed elsewhere—was inapplicable.

PharMerica is a long-term care pharmacy that processes prescriptions from nursing home physicians. As alleged by the relators, PharMerica defrauded Medicare and Medicaid by billing for prescriptions with altered dosages, form (*i.e.*, tablet vs. capsule), and kind (*i.e.*, brand name vs. generic). More specifically, the relators' complaint alleges that when PharMerica technicians manually entered data, they did so in a way that did not match the prescription authorized by the physicians. This conduct allegedly enhanced PharMerica's profit margins by increasing reimbursements from suppliers.

PharMerica moved to dismiss the relators' allegations under the FCA's public disclosure bar. This bar, created by Congress to prevent parasitic lawsuits, generally requires the dismissal of FCA claims when the allegations are "substantially the same" as allegations made public through earlier litigation. At the time the lawsuit commenced, PharMerica had previously litigated fraud allegations in *United States ex rel. Denk v. PharMerica*, No. 09-720, (E.D. Wis. July 23, 2009). Because both lawsuits involved allegations of prescription fraud, PharMerica argued that the allegations are "substantially the same" warranting dismissal.

The Court disagreed. Cautioning against a generalized inquiry, the Court recognized that "a careful look at the details of each alleged fraud" does not demonstrate "substantially the same fraud." In particular, the Court noted that although the *Denk* litigation alleged a number of prescription fraud schemes, each scheme involved the

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*absence* of a prescription. By contrast, the allegations at issue in *Sturgeon* include the altering of *valid* prescriptions in a way that maximizes reimbursements. In other words, the fact that both matters alleged fraudulent prescriptions was not sufficient to trigger the public disclosure bar and preclude liability. Instead, the Court explained, the relevant inquiry is whether the *way* each fraudulent scheme is effectuated is “substantially the same.”

This decision serves as a reminder that the public disclosure bar requires something more than generic or superficial similarity: it requires a similar “mode and means” of allegedly fraudulent conduct. Thus, FCA defendants seeking to trigger the public disclosure bar should strive to connect the alleged misconduct to the “how” and “why” of previously disclosed schemes.