Published on *The National Law Review* https://natlawreview.com

When a Bar is Not a Bar: First Circuit Denies En Banc Rehearing of First-To-File Bar Ruling

Article By:

Health Care Industry Practice Group

After a First Circuit Court of Appeals panel restored a relator's False Claims Act (FCA) suit against PharMerica, a long-term care pharmacy, the First Circuit denied the company's petition for rehearing and rehearing *en banc* on Monday, January 25, 2016 in *U.S. ex rel. Gadbois v. PharMerica Corp*. As a result, the relator will have another day in district court to pursue his allegations that the company submitted false Medicare and Medicaid claims by seeking reimbursement for drugs provided without a legal prescription– this time to argue for a chance to supplement his pleading to cure a lack of subject matter jurisdiction under the first-to-file bar.

The December First Circuit panel decision, and the decision to let it stand, is significant because the court addressed a matter of first impression to the First Circuit, deciding that that Federal Rule of Civil Procedure 15(d) is available to cure most defects in subject matter jurisdiction. Here, the defect in question is triggered by the FCA's first-to-file rule, which provides that if a lawsuit involving the same subject matter is already pending, "no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." 31 U.S.C. § 3730(b)(5). The First Circuit stated that dismissals under the first-to-file rule should be without prejudice, allowing the claim to be refiled once the first-filed action is no longer pending. By allowing relators in such situations to supplement their original pleadings, relators can now overcome the lack of subject matter jurisdiction and resuscitate their FCA claims.

In the district court, PharMerica sought to dismiss the amended complaint filed in 2011. The district court agreed that the first-to-file bar barred the relator's claims because a pending action in the Eastern District of Wisconsin was filed earlier, and thus dismissed the case for lack of subject matter jurisdiction. During the appeal briefing, however, as the First Circuit stated, "the tectonic plates shifted"; two events completely changed the legal landscape. First, the Supreme Court announced its decision in *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970 (2015), interpreting the phrase "pending action" used in the first-to-file bar. The Supreme Court interpreted the statute to mean that "an earlier suit bars a later suit while the earlier suit remains undecided but ceases to bar that suit once it is dismissed." *Id.* Second, the Wisconsin lawsuit – the first-filed action that had served as the bar to the relator's amended complaint under the first-to-file bar – was dismissed.

These two events, according to the First Circuit panel, “dissolved the jurisdictional bar that the court below found dispositive. Under the circumstances, it would be a pointless formality to let the dismissal of the second amended complaint stand — and doing so would needlessly expose the relator to the vagaries of filing a new action.” The court thus held that Federal Rule of Civil Procedure 15(d) – which allows a party to supplement a pleading to address “any transaction, occurrence, or event that happened after the date of the pleading to be supplemented” – could address subject matter jurisdiction defects, and stated that the relator could seek to supplement his complaint to address the dismissal of the Wisconsin case. Given the discretion granted to the district court under Rule 15, however, the panel remanded the case to the district court to decide whether to allow the relator to supplement the complaint.

This decision extends the reach of the Supreme Court’s decision in *Carter* weakening the first-to-file bar. Cases dismissed on the basis of the first-to-file bar can potentially be revived months or years later after the first-filed case is dismissed. The First Circuit’s decision thus increases the lack of finality that companies often face in FCA cases. On a more general note, it shows the somewhat unique challenges that companies face defending against FCA cases. Given that cases are often pending for years, the governing rules of the game can change at any point. Relators are highly incentivized to litigate procedural and jurisdictional issues because of the huge potential recovery that awaits a successful FCA relator. For this reason, defense against FCA claims should rarely proceed on a singular strategic focus, such as a procedural challenge to the relator’s complaint.

National Law Review, Volume VI, Number 29