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PharMerica to seek Supreme Court review of First Circuit's "next-to-file" False Claims Act ruling

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Last week, after losing its bid to the First Circuit for *en banc* rehearing, PharMerica Corp., appellee in *U.S. ex rel. Gadbois v. PharMerica Corp.*, 14-2164, disclosed that it would seek a writ of *certiorari* to the U.S. Supreme Court of the First Circuit's panel opinion regarding the False Claims Act's (FCA) first-to-file bar. The First Circuit's decision in *Gadbois* is the first major federal appellate decision interpreting the Supreme Court's 2015 ruling *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*, 135 S.Ct. 1970 (May 26, 2015). PharMerica's effort to seek further review will ask the high Court for clarification of how to treat a "next-to-file" whistleblower's claim when the "first-filed" complaint is dismissed. A grant of *certiorari* by the high Court would have the potential to substantially affect the FCA landscape.

In *Kellogg*, the Supreme Court altered the framework for FCA actions when it changed the previous requirement that only the "first-to-file" relator claimant could proceed with a *qui tam* action. In interpreting the FCA (31 U.S.C. § 3730(b)(5)), the Court held that those "next-to-file" relators may see their actions survive if the "first-filed" plaintiff's action is dismissed. This held out the prospect of "next-to-file" complaints being dismissed without prejudice, subject to re-filing once the "first-to-file" complaint was dismissed for any reason, significantly curtailing the prospects of finality for defendants who defeat an alleged whistleblower complaint through litigation.

In *Gadbois,* the First Circuit was presented with a case in which such a "next-to-file" complaint remained pending when the "first-filed" plaintiff's complaint was dismissed. As the First Circuit noted, the "tectonic" ruling in *Kellogg* shifted the landscape in Gadbois' favor when it was issued by the Supreme Court in the middle of the briefing of the First Circuit appeal. Interpreting *Kellogg*, the First Circuit found that the FCA did not preclude Gadbois, as "next-to-file" relator, from using the supplementation rule (Fed.R.Civ.P. 15) as a vehicle for bolstering his complaint against PharMerica Corp. with the allegation that the "first-filed" complaint had been dismissed, thereby curing his complaint's jurisdictional defect. The First Circuit's ruling effectively allows still-live "next-to-file" FCA complaints to escape a dismissal and re-filing requirement that could have placed such complaints in jeopardy of failing to satisfy statutes of limitations bars. While "next-to-file" claimants may face still numerous challenges to their complaints—including issue preclusion,

claim preclusion, or the public disclosure bar—the ability to adjust a complaint by supplement could be a benefit to plaintiffs.

PharMerica has stated that it plans to present to the Supreme Court the question of whether "the FCA's first-to-file bar requires dismissal of a follow-on *qui tam* case that is brought when a related action is pending, or [whether] a follow-on case filed during the pendency of a related action can evade the first-to-file bar by delaying the requisite dismissal until after the first-filed action is resolved." Appellee's Motion for Stay of Mandate, at 1. PharMerica argues that *Gadbois* encourages "next-to-file" plaintiffs to try to keep their actions alive, "in hopes that, through delay and groundless appeals such as this, their action might outlast the first-filed action." *Id.* at 5.

By directly challenging *Kellogg's* application to pending FCA actions rather than limiting the question presented to the use of the supplementation rule, PharMerica's prospects for obtaining a grant of *certiorari* may be limited, as less than a year has passed since the Supreme Court issued its decision in *Kellogg* and no clear circuit split has yet developed on this question. Even if the Supreme Court does not grant its petition for a writ of *certiorari*, PharMerica's position signals the profound impact that *Kellogg* already has made on critical FCA questions.

Whether *Gadbois* causes the First Circuit to become a more attractive forum for potential relators concerned about "first-to-file" issues, or whether *Gadbois*' reasoning will extend to other circuits is yet to be seen, but by seeking Supreme Court review of *Gadbois*, the issue of "first-to-file" complaints and still-pending FCA claims promises to remain a hotly contested FCA question over the coming year.

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