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Limits On 'Self-Help' Discovery In FCA Cases

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Law360, New York (June 27, 2017, 10:31 AM EDT) -- As illustrated by a recent decision by a federal court in Massachusetts, it is not uncommon for an employee to take company documents that the employee believes will support a claim under the False Claims Act 31 U.S.C. 3729 et seq. To the consternation of employers, courts have allowed such activity. But as the U.S. District Court in Massachusetts found in Unum Group v. Loftus last December (No. 4:16 CV 40154 TSH, 2016 WL 7115967, at *4), this right to "self-help" is not unlimited. Where courts draw the line, however, is not uniform, as is set forth below.

Most courts have adopted the approach articulated in a 2011 Ninth Circuit decision. In Cafasso v. General Dynamics C4 Systems Inc., 637 F.3d 1047, Cafasso took tens of thousands of pages of documents from her employer, including attorney-client privileged communications, trade secrets, internal research and development information, and sensitive government information. The employer then sued Cafasso in state court for return of the documents, alleging that Cafasso's action violated her confidentiality agreement with the employer. The state court issued a temporary restraining order that required the return of the documents. Cafasso then filed her FCA case, and successfully moved to have the state court lift the TRO and stay the state case. In response to the FCA case, the employer filed an answer and counterclaim, which alleged that Cafasso breached her confidentiality agreement. According to the Ninth Circuit, "acrimonious" discovery ensued, which included discovery abuses by Cafasso. Among the problems: Cafasso refused to identify which of the thousands of documents she took actually supported her FCA claims. Ultimately, the district court granted the employer's motion for judgment on the pleadings related to her FCA claim. at 1053. The parties then cross-moved for summary judgment on the remaining claims, including the employer's counterclaim related to breach of the confidentiality agreement. The district court entered judgment against Cafasso on all claims, and awarded attorneys' fees to the employer. Cafasso appealed.

On the issue of the employer's counterclaim that Cafasso violated her confidentiality agreement, the Ninth Circuit considered, and rejected, Cafasso's claim that her conduct should have been permissible as a public policy exception to the confidentiality agreement — namely that her actions should have been

protected because she was investigating claims she would assert under the FCA, which permits the whistleblower to take investigative steps. While recognizing "some merit" to a public policy exception, the Ninth Circuit declined to adopt Cafasso's argument. The Ninth Circuit said Cafasso's conduct included "vast and indiscriminate appropriation of [the employer's] files." The Ninth Circuit stated that, a public policy "exception broad enough to protect the scope of Cafasso's massive document gathering in this case would make all confidentiality agreements unenforceable as long as the employee later files a qui tam action." The court concluded that even under a public policy exception, relators would have to make a particularized showing "to justify why removal of the documents was reasonably necessary to pursue an FCA claim."

Several district courts have adopted the reasoning in Cafasso or embraced a similar approach. See, e.g., United States ex rel. Rigsby v. State Farm Fire and Casualty Co., No. 1:06cv433-HSO-RHW, 2014 WL 8028831, at *13 (S.D. Miss. Aug. 6, 2015) (holding that the FCA did not foreclose State Farm's counterclaims for relator's taking of 15,000 pages of documents, which counterclaims included conversion, breach of contract, and common law fraud and stating that the court did not read the FCA as "insulating any and all conduct perpetrated by a whistleblower who brings an FCA claim" nor were such claims void as against public policy); United States ex rel. Ruscher v. Omnicare Inc., No. 4:08–cv–3396, 2015 WL 4389589, at *5 (S.D. Tex. July 15, 2015) (while public policy barred Omnicare from recovering damages related to FCA-related documents disclosed to her attorney and the government, the court did not dismiss counterclaims arising from documents relator took that were unrelated to her FCA case because "[i]t is possible that Omnicare may be able to show damages flowing from the taking of documents not related to this claim"); Walsh v. Amerisource Bergen Corp., No. 11–75842014, WL 2738215, at *7 (E.D. Pa. June 17, 2014) (recognizing that public policy considerations protect relators' taking of documents in some cases, but holding that the public policy exception does not apply where the relator took documents unrelated to the FCA claims, and allowing the employer to pursue that counterclaim).

Employing similar reasoning, in Loftus the district court granted injunctive relief to the employer and required the employee to return all of the removed documents where the employee had not yet filed an FCA claim. The court recognized "the substantial public interest in facilitating whistleblower actions," but emphasized that no suit had been filed and therefore Loftus's "self-help discovery" was "not mitigated by the existence of an actual lawsuit."

The upshot of these cases: Indiscriminate taking of documents by whistleblower employees can be addressed by the employer in court.

Yet, not all courts have followed the reasoning of Cafasso. Some courts have adopted a "relevance" standard, defined by the scope of Federal Rule of Civil Procedure 26. The question asked is whether the documents are relevant to the claim or could lead to the discovery of admissible evidence. Applying this standard, the court in United States ex rel. Ceas v. Chrysler Group LLC, 191 F.Supp.3d 885, 888 (N.D. Ill. 2016), rejected the employer's attempt to obtain the return of documents. In that case, the employee allegedly accessed a database without authorization and took certain reports. The court reasoned that '[h]aving Plaintiff return these documents only to have Defendants then send them back to Plaintiff would be an unnecessary inefficiency on both parties" and contrary to Rule 26.; see also Shmushkovich v. Home Bound Healthcare Inc., No. 12 C 29242015, WL 3896947, at *3 (N.D. Ill. June 23, 2015) (allowing the relator to retain copies of any documents the relator determined were relevant, and ordering the relator to provide the defendant with a list of documents retained to allow the defendant to contest relevance under Rule 26). In the words of one court, "[i]t is unrealistic to impose on a relator the burden of knowing precisely how much information to provide the government when reporting a claim of fraud,

with the penalty for providing what in hindsight the defendant views as more than was needed to be exposure to a claim for damages." United States ex rel. Cieszynski Lifewatch Services Inc., No. 13 CV 4052, 2016 WL 2771798, at *5 (N.D. Ill. May 13, 2016).

But even under this broader approach, courts will query whether the information taken was trade secret, protected by the attorney-client privilege, and seek to determine whether the relator disclosed the information broader than necessary to pursue a False Claims Act claim. See, e.g., Cieszynski, at *5.

Faced with the fact pattern of an employee engaging in self-help discovery in the FCA context, what's an employer to do? Conduct an investigation to determine the nature of the information taken. Such investigation should include: the volume of documents taken; the date and time the documents were removed or copied; whether the documents are trade secret in nature; whether the documents are covered by the attorney-client privilege or work product doctrine; whether the documents relate to the work performed by the employee who removed them; and confirmation that the employee signed a confidentiality agreement.

After the investigation, and depending on the results, the employer should consider legal action. The Cafasso line of cases suggests that a complaint based on breach of contract and conversion, along with injunctive relief. And the Loftus case suggests that speed in filing may be critical to success.

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