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New Jersey Federal Court Allows "Self-Help" Counterclaims Against Potential FCA Whistleblowers To Proceed

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Last week, a New Jersey federal court allowed medical device maker **Boston Scientific Neuromodulation Corp.** ("Boston Scientific") to proceed with counterclaims against two of its former employees for violating their contracts with the company by retaining and disclosing company proprietary data after they were terminated. The former employees have asserted False Claims Act claims against Boston Scientific, accusing it of submitting fraudulent claims for one of its devices and **engaging in a kickback scheme with doctors**.

The former employees argued that the counterclaims must be dismissed on public policy grounds as an attempt by Boston Scientific to withhold evidence of the company's wrongdoing. Noting that it had to accept factual allegations as true in considering the former employees' motion to dismiss, the court succinctly held that "[t]he amended counterclaims state with sufficient particularity the circumstances constituting the Relators' breach of contract."

This decision is the latest of a series of decisions in which courts have evaluated whether potential whistleblowers can engage in "self-help" discovery by taking company documents they believe are relevant to their claims. Courts have recognized that an employee's right to pursue a valid complaint or claim does not license him to plunder his employer's files and databases looking for evidence relevant to it. False Claims Act cases, however, have taken conflicting approaches to the issue.

For instance, in Cafasso v. General Dynamics C4 Systems, Inc., 2009 WL 3723087 (D. Ariz. Nov. 4, 2009), the court explained that while the "False Claims Act required [the plaintiff whistleblower] to give the Government substantially all material evidence and information she possessed," "public policy does not immunize [the plaintiff], [who] confuses protecting whistleblowers from retaliation for lawfully reporting fraud with immunizing whistleblowers for wrongful acts made in the course of looking for evidence of fraud." The court concluded that "[s]tatutory incentives encouraging investigation of possible fraud under the FCA do not establish a public policy in favor of violating an employer's contractual confidentiality and nondisclosure rights."

By contrast, in Head v. Kane Co., 668 F. Supp. 2d 146 (D.D.C. 2009), the court held that a former employer's breach of contract counterclaim against its former employee was void as against public policy because "[e]nforcing a private agreement that requires a qui tam plaintiff to turn over his or her copy of a document, which is likely to be needed as evidence at trial, to the defendant who is under

investigation would unduly frustrate the purpose" of the False Claim Act provision requiring relators to disclose to the Government all material evidence and information in their possession.

The issue of self-help discovery should be explored by an employer any time it receives a complaint or lawsuit alleging retaliation or other misconduct from a former employee. If an employer determines that its former employee stole documents or data in violation of company policy, it may be able to establish a defense to liability or a limitation on damages under an after-acquired evidence or "unclean hands" theory. In addition, the employer may be entitled to assert counterclaims or obtain discovery sanctions against the former employee based on his or her misconduct. However, given the evolving case law in this area, employers should carefully assess the status of the precedent and the pros and cons of pursuing such defenses and claims.

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