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Johnson v. Wells Fargo Bank Nat'l Ass'n, 132 Nev. Adv. Op. 70 (September 29, 2016)

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Johnson v. Wells Fargo Bank Nat'l Ass'n, 132 Nev. Adv. Op. 70 (September 29, 2016)[1]

CIVIL PROCEDURE: DISCOVERY

Summary

The Court considered whether the Bank Secrecy Act prevents financial institutions from disclosing all investigative information in discovery to an adverse party. The Court held that the Bank Secrecy Act only precludes the disclosure of information relating to the existence of a suspicious activity report or the procedural nature of the suspicious activity report's generation.

Background

Appellant Johnson owned three Wells Fargo business bank accounts. Wells Fargo informed Appellant that it would close the accounts. Approximately two months after this notice, Appellant learned that Wells Fargo closed the accounts because they had detected criminal activity. Appellant filed a complaint and subsequently a motion to compel to retrieve information related to the bank's criminal activity detection.

Wells Fargo argued that it would violate the suspicious activity report ("SAR") discovery privilege under the Bank Secrecy Act if it disclosed such information, to which the discovery commissioner agreed. Appellant disagreed and argued that this ruling excluded too much discoverable information. The District Court agreed that the SAR information should not be disclosed, but required Wells Fargo to disclose a "privilege log," and instructed the discovery commissioner to review the adequacy of said log. The commissioner approved the log's content, and limited Appellant's discovery to that document. As a result, the District Court dismissed Appellant's declaratory relief claim.

Discussion

The Bank Secrecy Act requires financial institutions to send reports to the government when it detects an activity of interest to the government, i.e. criminal activities.[2] The Act restricts a financial institution from disclosing to any party that the institution detected a suspicious act, and whether the suspicious act caused the institution to generate a suspicious activity report ("SAR").[3] Furthermore, even if a financial institution receives a discovery request, such information is privileged, and the financial institution must refrain from disclosure.[4]

Nevertheless, this privilege is not all encompassing. The First Circuit of the United States Court of Appeals held that the prevention of disclosure only extends so far as evidence that suggests a SAR exists.[5] In other words, information relating to a financial institution's investigation may be disclosed so long as that information does not indicate whether a SAR

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[2] 31 U.S.C. § 5311.
[3] 31 U.S.C. § 5318(g)(2)(A)(i); 12 C.F.R. § 21.11(k); 12 C.F.R. § 21.11(b)(3) (noting the acronym "SAR.")
[4] 12 C.F.R. § 21.11(k)(1)(i).
[5] In re JPMorgan Chase Bank, N.A., 799 F.3d 36, 43–44 (1st Cir. 2015).

report has been generated. Had the drafters of the Act wanted all investigative information shielded from disclosure, they would have used more comprehensive language. Thus, the proper analysis for determining whether evidence may be disclosed in compliance with the Bank Secrecy Act is whether the evidence indicates whether a financial institution generated a SAR.

In the instant case, the discovery commissioner used the correct analysis, that "[d]ocuments which constitute a [SAR], if any SAR exists, and/or the policies and procedures that are created to prepare a possible SAR are confidential and protected," and "[f]actual supporting documentation that accompanied a SAR, if one exists, or possible SAR, which have been prepared in the ordinary course of business are not protected."

Conclusion

Applying the SAR analysis used by the commissioner in the instant case, The Bank Secrecy Act precluded Wells Fargo from disclosing the documents Appellant requested in discovery. Therefore, the Court "affirm[ed] the order of the district court dismissing appellant's declaratory relief claim."