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5 Takeaways As DOJ Investigative Powers Get Challenged

By **Jeff Overley**

Law360 (May 1, 2018, 9:21 PM EDT) -- The U.S. Department of Justice's swift move to curtail a False Claims Act investigation after being accused of overstepping its authority is raising questions about other investigative overreaches by the DOJ and may shake up the agency's future approach to fraud inquiries. Here, Law360 explores five takeaways from a challenge to DOJ powers.

Quick Retreat Suggests Government Overstepped

The DOJ curtailed its investigation after being hit with a court challenge last week by a podiatry chain that is embroiled in FCA litigation brought by former employees. At issue were five "civil investigative demands" that the DOJ issued after electing not to intervene in the case.

The challenge filed by Kentucky-based Lexington Foot & Ankle Center PSC voiced procedural objections to the civil investigative demands, which sought documents and testimony. The podiatry chain argued that the FCA doesn't authorize CIDs after the government elects to intervene or not. Within three days of the challenge, the DOJ backed down, rescinding all the CIDs and leading Lexington Foot & Ankle to voluntarily drop its challenge.

Several attorneys told Law360 that the challenge was well-founded and that the DOJ would have been hard-pressed to fight back. The attorneys pointed to statutory language that authorizes the government to issue CIDs "before commencing a civil proceeding under [the FCA] or making an election under [the FCA]."

"I don't think this is a very close call," Covington & Burling LLP partner Peter B. Hutt II said.

The DOJ, which declined to comment for this story, did not submit any court filings that acknowledged any overreach. But attorneys said that there are strong policy reasons — not just strong statutory language — that should bar CIDs after the DOJ declines to intervene.

For one thing, allowing CIDs to continue would create an unusual situation in which the government declines to litigate an FCA case but nonetheless uses its investigative powers to help an FCA relator do so.

"They can't have their cake and eat it too," said Robert Rhoad, a partner at Sheppard Mullin Richter & Hampton LLP. "They shouldn't be able to decline intervention ... and then issue CIDs and give [evidence]

to a relator."

Allowing CIDs to continue would also result in companies having to deal with one set of FCA allegations in two different places, which would be atypical and arguably create an unwarranted burden.

"Were the court to allow those CIDs to continue, then the defendant would basically be litigating in two different forums," Epstein Becker Green member George Breen said.

Furthermore, if the DOJ could keep firing off CIDs after declining to intervene, it would effectively have carte blanche in perpetuity to keep demanding documents and testimony from a company. Defense attorneys say that would run counter to the FCA, which sets a 60-day window for the DOJ to investigate and only allows extensions when there is "good cause."

"The 60-day [provision] would effectively be rendered meaningless," Breen said. "[The DOJ] could investigate and investigate and investigate without any kind of check or limitation on that power."

Challenge Shines Light on Intervention Decisions

It isn't clear how often the government continues to send CIDs after declining to intervene in FCA cases. But the challenge brought by Lexington Foot & Ankle underscored the fact that companies can be unaware of intervention decisions, mainly because FCA cases remain under seal when the DOJ is investigating.

Notably, Lexington Foot & Ankle Center said that it didn't learn of the DOJ's intervention decision until April 9, two months after the DOJ on Feb. 9 informed a Kentucky federal judge.

That delay means that the podiatry chain could have unwittingly complied with invalid CIDs. That it narrowly averted doing so is a cautionary tale for other FCA targets, attorneys say.

"Defendants are going to have to be alert to asking themselves the question, 'Is it possible that the more recent CIDs that I am receiving in fact might be after a declination decision has been made?'" Hutt said.

To answer that question, companies that receive CIDs should ask the DOJ point-blank whether it has made an intervention decision, Hutt said.

FCA Inquiries May Become Longer and Broader

To the extent that Lexington Foot & Ankle reminded the DOJ of limits on its investigative powers, there could be upcoming changes to how FCA investigations are handled, attorneys say.

For one, the DOJ may increasingly pressure federal judges to allow more time before it must make intervention decisions. In addition, the DOJ could issue civil investigative demands quickly when FCA cases emerge, instead of waiting to contemplate allegations and gather basic facts, as it does now in many cases.

"Perhaps they will press further for extensions," Breen said. "Perhaps they will issue CIDs earlier on in the process."

It's not clear, however, that judges will accommodate lots of extra extensions. The DOJ’s tendency to

delay intervention decisions frequently draws criticism, and Attorney General Jeff Sessions, when he was a Republican senator from Alabama, prodded the DOJ in 2010 for seeking "prolonged extensions."

"Courts have become much more strict in terms of not countenancing that kind of conduct by the government, saying, 'Look, you basically have to fish or cut bait,'" Rhoad said.

It's also possible that civil investigative demands could become wider in scope. CIDs already tend to be very expansive, but the prospect of losing CID power could prompt the government to cast an even wider net.

"Around the edges, Department of Justice attorneys are going to have an incentive to draft CIDs as broadly as they think they will ever need during the course of the investigation, because they may lose the ability to fashion additional CIDs," Hutt said.

Intervention Decisions Might End Valid CIDs

The challenge filed by Lexington Foot & Ankle noted that the government issued one CID before making its intervention decision. The podiatry chain didn't voice any objections to that CID, but observers say that its existence raises another important question: whether a valid CID loses its validity after the government makes an intervention decision.

"There are many situations where the government may seek to continue to receive information ... under the existing CID," Hutt said. "There is a real question in my mind about whether the government can do that under the language of the statute. And I think the answer is no."

Other defense attorneys agreed, saying that continued use of an older CID would run contrary to the purpose of the CID power.

"Once the government elects, it seems to me it doesn't get to continue to use tools that were timely when they were issued," Breen said. "I think it flies in the face of the intent of the statute, which was to provide a limited opportunity for the government to decide whether to get involved in a False Claims Act case."

New Signs of Fraud Not Shielded by Intervention Decision

There is no indication that the older CID issued to Lexington Foot & Ankle turned up any evidence of potential fraud unrelated to the original FCA case. But the company's challenge nonetheless raises a question about what happens in such instances: Could the government keep sending CIDs regarding the unrelated matter, even after making an intervention decision in the original case?

Attorneys say that the DOJ would likely be on solid ground in continuing to pursue the unrelated matter, even after declining to join an FCA case, because the unrelated matter would effectively be an independent issue not subject to the FCA suit's time limits.

"To the extent that there's separate information that's wholly unrelated to the [original] issue, then I will confess I don't think there's a problem with that," Rhoad said. "I think they can go forward with that."

Breen echoed that point. "If, as a result of the CID, the government identifies separate and distinct potentially fraudulent conduct, I do not believe that there would be success in an effort seeking to

preclude the investigation of that conduct," he said.

Lexington Foot & Ankle is represented by Christopher A. Melton of Wyatt Tarrant & Combs LLP.

The U.S. is represented in the CID matter by Carrie Pond of the U.S. Department of Justice.

The CID case is Lexington Foot and Ankle Center PSC et al. v. U.S., case number 5:18-cv-00283, and the FCA case is U.S. ex rel. Richardson et al. v. Lexington Foot and Ankle Center PSC et al., case number 5:17-cv-00129, both in the U.S. District Court for the Eastern District of Kentucky.

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