

PUBLICATION

Providers Be Aware of Limitations on Government's Ability to Conduct Investigations Under False Claims Act

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The Department of Justice (DOJ) recently backed down when a provider challenged DOJ's use of Civil Investigative Demands (CIDs) as part of an investigation into alleged violations of the False Claims Act (FCA). The case serves as a useful reminder that the government's investigative powers are not unlimited, and providers have the right and the ability to push back if DOJ exceeds its authority in the course of an investigation.

DOJ is authorized by law to file a lawsuit under the [FCA](#), or to intervene in a whistleblower's FCA qui tam lawsuit under the terms set forth in the FCA. Prior to filing its own lawsuit or intervening in a qui tam suit, DOJ is authorized to conduct an investigation using CIDs to compel a provider to produce documents, answer interrogatories, and/or provide [testimony](#). The FCA states that CIDs must be issued *before* DOJ commences its own suit or elects whether or not to intervene in a qui tam [suit](#).

A provider relied on that FCA provision to challenge DOJ's issuance of three CIDs after DOJ had declined to intervene in a qui tam suit. A whistleblower had filed a qui tam lawsuit under seal against the provider (Lexington Foot & Ankle Center) on March 15, 2017.¹ DOJ began to investigate the whistleblower's allegations while the qui tam case remained under seal, and was granted repeated extensions of the seal period while it pursued its investigation. Ultimately, however, the court ordered the government to make an intervention decision by February 12, 2018. On February 9, 2018, DOJ filed a notice with the court stating that it had not yet completed its investigation and had not yet decided whether to intervene, but given the court's deadline, announced that "it is not intervening at this time; [h]owever, the Government's investigation will continue...."²

Approximately two months after it declined to intervene in the qui tam suit, DOJ served a CID on the provider. Two weeks later, DOJ served two additional CIDs on the provider. Thereafter, the provider filed a petition to set aside the CIDs because they were served after the government declined to intervene.³ Four days later, DOJ agreed to withdraw the CIDs, without any explanation or attempt to defend its issuance of the CIDs.⁴ It was clear, however, that DOJ was not authorized to issue the CIDs after it declined to intervene in the qui tam suit.

The use of CIDs in FCA investigations has become increasingly common, as well as an added burden on providers in terms of expense and time devoted to compliance with CIDs. Providers understandably would seek to avoid the burden of responding to unauthorized CIDs issued by DOJ, but it is not always apparent that a CID is unauthorized. A qui tam lawsuit must be filed under seal, and until DOJ decides whether or not to intervene, the court records remain under seal. DOJ's intervention decision eventually becomes a public document in the court's record, but a provider may not learn it is a defendant in a qui tam suit, and may not be aware of DOJ's intervention decision, until the provider is served with the qui tam complaint. As in the case of *Lexington Foot & Ankle Center*, a provider may receive a CID in connection with a qui tam suit, yet be unaware of DOJ's intervention decision because the provider has not yet been served with the qui tam complaint. Several months may pass between DOJ's intervention decision and service of the complaint, allowing the possibility that a provider is unaware that a CID was served *after* DOJ's intervention decision in a qui tam case.

Next Steps for Providers

While the recent exposure of DOJ's attempt to use unauthorized CIDs will hopefully discourage the practice going forward, there are several steps a provider's legal counsel should take to protect a provider that receives a CID:

- Confirm that the government has not already commenced its own FCA lawsuit against the provider.
- If the government has already filed a lawsuit, object to the CID.
- Contact the DOJ representative issuing the CID to determine whether the CID was issued in connection with a qui tam lawsuit.
- If there is a qui tam suit pending, seek assurances from DOJ that it has not yet filed its decision whether to intervene in the qui tam case.
- If DOJ represents that it has not yet made an intervention decision, monitor events for any change in status.
- If the provider learns that DOJ already made an intervention decision in a qui tam suit, object to the CID.
- Attempt to narrow the scope of the CID because it is possible the CID was drafted to be overly broad in anticipation of the possibility that DOJ will not be permitted to serve another CID in the future if a court forces the government to make an intervention decision before DOJ completes its investigation.

¹ *U.S. ex rel. Richardson v. Lexington Foot & Ankle Center, PSC*, No. 5:17-cv-129-DCR (E.D. Ky.) (Doc. 1).

² *Id.* (Doc. 13).

³ *In re Civil Investigative Demands*, No. 5:18-cv-283-DCR (E.D. Ky.) (Doc. 1). DOJ had also served a CID before it declined to intervene, but that CID was not challenged in that proceeding.

⁴ *Id.* (Doc. 7).