

Gov't Intervention In A Private Civil Suit Can Benefit Defendant

By **David Axelrod and Izabella Babchinetskaya** (March 4, 2020)

It's a call you dread. The call from a government prosecutor informing you that the company you're representing in a civil suit is now also the subject of a government investigation. While no company celebrates being informed of a government investigation, there is a silver lining — that is, the government may intervene to stay the civil suit while the investigation is ongoing.

It is well established that the U.S. government may intervene in a federal civil action when the government is engaged in an ongoing criminal investigation related to the civil matter. The government will intervene to protect the government's interest in its criminal investigation, but this intervention also serves to benefit the company, at least in the short term.

The government recently intervened in *Roofers' Pension Fund v. Perrigo Co. PLC*, a civil securities class action and related individual suits filed against Perrigo Co.[1] The civil suits allege that Perrigo made misrepresentations and omissions to investors when it failed to disclose it was engaged in unlawful price fixing in its generic drug division.

While the civil suit was headed toward discovery — notices of depositions were sent out, including a Rule 30(b)(6) deposition concerning generic drug pricing — the government continued to conduct a criminal investigation into antitrust violations. In September, the court granted the government's uncontested motion to intervene, and then, in October, the court granted a limited discovery stay, which was extended in December until March 15.

The stay is limited to depositions of certain individuals involved in Perrigo's sale, pricing or marketing of generic pharmaceuticals, including any Rule 30(b)(6) depositions on these topics.

The government explained that the Federal Rules of Civil Procedure provide two mechanisms for intervention in a private civil suit — intervention as a matter of right or as a matter of discretion.

Under Rule 24(a), the government can intervene as a matter of right where:

(1) the application for intervention is timely; (2) the applicant has a sufficient interest in the litigation; (3) the interest may be affected or impaired, as a practical matter by the disposition of the action; and (4) the interest is not adequately represented by an existing party in the litigation.[2]

In the alternative, the government can seek intervention as a matter of the court's discretion. Under Rule 24(b), a third party can intervene in an action where there is a claim or defense that shares a common question of law or fact with the original suit, intervention will not unduly delay the proceeding, and the original parties will not be prejudiced.

In crisis situations, like the one facing Perrigo, where a company is simultaneously facing



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both civil lawsuits and a criminal investigation, the dual threat and accompanying costs can be overwhelming on a business. However, convincing the government to intervene and move to stay the civil cases can be beneficial for several reasons.

First, the stay allows the company to triage the threats and focus solely on the government investigation. This allows the company to focus their resources — both logistical and financial — on the primary threat.

Second, government intervention protects employees from having to make a difficult decision about invoking their Fifth Amendment rights. When a company's employees are faced with depositions in a civil suit while the company is under investigation, the employees must decide whether to testify and risk saying something that could be used against them criminally or invoking their Fifth Amendment rights.

While the Fifth Amendment invocation is inadmissible in a criminal case, in a civil case it can be used to support an adverse inference that the company engaged in wrongdoing. Staying these depositions saves the employees from testifying and protects the company from the prejudicial impact of a Fifth Amendment adverse inference.

Third, and perhaps most importantly, a government stay allows the company the opportunity to put the government investigation to bed — hopefully with a declination — that could be useful in eliminating any leverage plaintiff's counsel sought to gain from the prospect of the investigation and possible criminal liability.

When faced with a motion to intervene and a request to stay the civil proceeding, many judges have recognized the benefits of granting these motions. For example, the court in *In re: Royal Ahold NV Securities & ERISA Litigation* allowed the government to intervene and stay a multidistrict litigation related to securities violations. The court explained that the stay would streamline the civil discovery process and could even lead to judicial economy by encouraging early settlement in the civil action.[3]

Furthermore, courts have recognized the dilemma of zealously defending oneself in a civil suit and protecting one's Fifth Amendment rights. In *Ashworth v. Albers Medical Inc.*, a civil suit against pharmaceutical manufacturers related to the sale of counterfeit goods, the court granted the government's motion to intervene and stay the proceeding. The government indicated that an indictment was forthcoming in its investigation of three defendants involved in the civil action.

The court granted a stay because not doing so would prejudice the defendants by expanding the scope of discovery allowed in criminal cases, undermine the defendants' trial strategies and endanger the defendants' Fifth Amendment rights.[4]

The importance of one's Fifth Amendment rights was emphasized in *White v. Mapco Gas Products Inc.*, a civil action alleging a price-fixing conspiracy for liquid propane gas. There, a grand jury was impaneled to investigate the liquid propane gas industry, specifically targeting three individuals in the industry.

Although the individuals that were the subject of the criminal investigation were not named in the civil action, the court granted the stay to protect their Fifth Amendment rights, as speaking on behalf of the company in the civil action could be harmful in a future criminal case.[5]

All in all, the government's intervention in a civil suit can be beneficial to any potential

criminal defendant. Intervention protects the defendant's constitutional rights, while also reducing the cost of litigation. Furthermore, the outcome of the criminal investigation can become a bargaining chip to promote early settlement in the civil suit.

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[1] *Roofers' Pension Fund v. Perrigo Company, plc, et al.*, No. 16-cv-2805-MCA-LDW, ECF No. 218, (D.N.J Sept. 4, 2019)

[2] *Harris v. Pernsley*, 820 F.2d 592, 596 (3d Cir. 1987).

[3] *In re Royal Ahold N.V. Securities & ERISA Litigation*, 220 F.R.D. 246 (D. Md. 2004).

[4] *Ashworth v. Albers Medical, Inc.*, 229 F.R.D. 527 (S.D. W. Va. 2005).

[5] *White v. Mapco Gas Products, Inc.*, 116 F.R.D. 498 (E.D. Ark. 1987).