CRITICAL CHARGES V. CIVIL DISCOVERY

WHO WINS?

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Parallel and competing criminal and civil cases are a fact of life in my practice areas but never fail to cause consternation to risk management. The trucking and transportation industry must constantly contend with the possibility of criminal charges against drivers, especially in highly publicized fatality cases. In the professional liability world, a negligent act, such as a lawyer failing to file suit within the statute of limitations, may also be connected to an act giving rise to criminal charges, such as stealing the same client's settlement obtained from another defendant. In Las Vegas, parallel criminal and civil proceedings also occur where gamblers fail to pay certain forms of debt to a casino. The district attorney may pursue criminal charges while the casino pursues its civil remedies.

When these competing, parallel proceedings occur, they create tension arising from the interaction of a criminal defendant's Fifth Amendment rights against self-incrimination versus the comparably minimal restrictions of civil discovery. If the criminal defendant participates in civil discovery before the criminal charges are resolved, the information gathered could be used against him in the criminal case. Most often, the criminal defendant wants to stay the civil matter pending the outcome of the criminal matter. The civil plaintiffs, and sometimes other civil parties, typically resist this request. Yet if the criminal defendant does not participate in civil discovery, he risks an adverse judgment that may, in some circumstances, flow to an employer. If a criminal defendant invokes his Fifth Amendment rights during the course of parallel civil discovery, what happens?

I. THE FRAMEWORK: WEIGHING OPTIONS AND RISKS

In my home state of Nevada, there was no guidance on this issue until *Aspen Fin. Servs. v. Dist. Ct.*, 128 Nev. Adv. Op. 57, 289 P.3d 201 (2012) issued. The case arose from certain real estate investments which failed. During the civil lawsuit

> [t]he Aspen defendants filed a motion with the district court to stay any depositions and written discovery that would require their employees and officers or Guinn to make testimonial statements. The Aspen defendants asserted that the Federal Bureau of Investigation

> (F.B.I.) had initiated a criminal investigation into their activities at the behest of the Gragson plaintiffs. They further asserted that they had been served with a federal grand jury subpoena seeking information about various subjects, including the loans for the Milano property. In addition, the Aspen defendants argued that the Gragson plaintiffs had been, and would continue, funneling discovery obtained in the civil proceeding to the F.B.I. After an extensive hearing, the district court issued a written order summarily denying the motion without prejudice.

Id. The court noted the difficult choice confronting a party to both civil and criminal proceedings.

> Here, if discovery is not stayed, Guinn, in particular, will face a difficult choice when the Gragson plaintiffs depose him. He can either waive his Fifth Amendment privilege and risk revealing incriminating information to criminal investigators, or he can assert his privilege and forego the opportunity to deny the allegations against him under oath, thereby effectively forfeiting the civil suit.

Id. (citations and quotations omitted). These were the same problems observed by federal courts. Milton Pollack, Sr. J., U.S. Dist. Ct., S.D.N.Y., Parallel Civil and Criminal Proceedings, 129 F.R.D. 201, 202 (Oct. 17-19, 1989).

The Supreme Court of Nevada chose to adopt a framework used by the Ninth Circuit to address this predicament.

> [C]ourts should analyze 'the extent to which the defendant's fifth amendment rights are implicated as well as the following nonexhaustive factors: (1) the interest of the plaintiffs in proceeding expeditiously with [the] litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources; (4) the interests of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil and criminal litigation.

Id. (*quoting Keating v. Office of Thrift Supervision*, 45 F.3d 322 (9th Cir. 1995). It appears other states and federal circuits have considered similar standards. Applying these criteria to the facts, the court ultimately concluded a stay was not appropriate.

II. PRACTICAL CONSIDERATIONS FOR HANDLING THE TENSION

For practical purposes, what can clients do when this problem arises? As the courts have noted, the answer is case specific. For instance, Nevada is like many jurisdictions in that misdemeanor traffic convictions are typically inadmissible. Pursuing a stay of civil discovery pending resolution of a misdemeanor traffic charge may cost more to obtain than it is worth. To explore other factors to consider, assume a trucking accident has occurred with multiple fatalities and the truck driver has been charged with at least one felony.

Step One: What is the driver going to do? Do not necessarily assume the driver will invoke his Fifth Amendment rights during the civil aspect of the case. He may have reasons to actively and vocally defend himself. However, if the driver has been charged and will invoke his Fifth Amendment rights, then it seems the proper procedure is to file a motion in the civil case seeking a stay of discovery pending the resolution of the criminal charges.

Step Two: Will the plaintiffs oppose the motion to stay? This is a significant question. Opposing this motion is the more active and expensive path for plaintiffs, but also seems more common. If the court denies the motion for stay, the plaintiffs must then go through the normal discovery process, which may force the driver to assert his Fifth Amendment rights. Should he do so, it could result in summary judgment against him unless other, sufficient evidence can be presented. Nevada explicitly contemplated this result in *Francis v. Wynn Las Vegas, LLC*, 27 Nev. Adv. Op. 60, 262 P.3d 705 (2011) where Girls Gone Wild founder Joe Francis invoked Fifth Amendment rights during deposition. *Francis* concluded Fifth Amendment rights may be invoked in civil litigation, however "a claim of privilege will not prevent an adverse finding or even summary judgment if the litigant does not present sufficient evidence to satisfy the usual evidentiary burdens in the litigation." *Id.* at 711 (citation and quotation omitted).

Not opposing the motion for stay seems the more cost-effective route, especially for plaintiffs' counsel retained pursuant to a contingency fee. In doing so, the State effectively prosecutes the plaintiffs' liability case at no cost to him. If the driver is convicted, Nevada's NRS 41.133 establishes a judgment of conviction will impose civil liability, leaving only damages for trial. Even if the State does not obtain a conviction, it performs much of the work required to prosecute a civil claim. Plaintiffs' counsel also gets a free mock trial experience to see how the case plays to a jury. For this reason, some transportation clients have elected to hire separate criminal counsel to defend the driver so long as the civil case remains pending. My office has erected partial firewalls in the past to enable an independent criminal defense while coordinating, where possible, the criminal and civil defenses.

Assuming the motion for stay is opposed, know the motion faces an uphill battle. *Aspen* noted a stay is not constitutionally required and is an extraordinary remedy only proper in extraordinary circumstances. It cited to case law from around the country concluding similarly.

Step Three: Will the court grant the motion to stay civil discovery? A preliminary concern of courts considering these motions is the degree of overlap between the civil and criminal cases. If a driver is criminally charged for the same accident that is the subject of the civil case, the degree of overlap is very high. However the driver's pending charges for tax evasion would result in very little overlap and would not favor a stay of civil discovery.

If the cases sufficiently overlap, the courts then consider the status of the criminal matter. Generally, if criminal charges have not been filed civil courts will be reluctant to grant a stay absent special circumstances demonstrating an indictment is inevitable. Assuming these factors are satisfied, the courts then proceed to apply the five factors discussed above.

In summary, competing criminal and civil claims present difficult risk management scenarios. They can complicate defense efforts and increase the cost of defense by necessitating civil and criminal counsel. Clients who proactively address the problems these competing interests present have the best chance to minimize potential adverse results.

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Expert Analysis

Parallel Proceedings: Staying the Civil Action

By **Derelle Janey**

On July 8, 2014, Rengan Rajaratnam was found not guilty of federal criminal charges that he took part in an insider trading conspiracy involving a network of hedge fund managers and analysts sharing confidential tips. Rajaratnam's acquittal was particularly noteworthy because it was the first defeat of federal prosecutors pursuing insider trading convictions in the Southern District of New York after a string of 81 convictions.[1] Rengan Rajaratnam's older brother, Raj Rajaratnam, founder of the hedge fund Galleon Group, was one of those convicted in the crackdown of insider trading activity. He was sentenced to an incarceratory term of 11 years. For the younger Rajaratnam, his liberty was now reassured following a criminal investigation that lasted years.

However, Rajaratnam must now contend with a SEC civil action commenced on the same underlying facts. That matter was stayed during the criminal proceeding. Not all defendants in parallel proceedings are so fortunate that they can address the civil matter after the criminal case concludes.

Courts have long held there is a particular threat to a defendant's due process rights where a criminal prosecutor and a government civil enforcement agency might share information during a parallel proceeding, thereby working together to undermine a defendant's due process. The government might effectively undermine rights that would exist in a criminal investigation by conducting a de facto criminal investigation using nominally civil means.[2] In Rajaratnam's case, that risk was apparently avoided.

Nevertheless, a stay of the civil proceeding is hardly a foregone conclusion, even if the civil action is commenced by a government agency. Where the action is brought by a private party, a stay should never be taken for granted. The Constitution does not require a stay of civil proceedings pending the outcome of related criminal proceedings.[3] In the absence of a stay, a defendant in a parallel proceeding will be required to defend against the criminal prosecution and choose between either testifying or asserting the Fifth Amendment privilege in the civil matter. Given the sheer number of white-collar prosecutions across Wall Street over the past couple of years and with no end in sight, it is now commonplace for defendants charged by the Department of Justice in white collar cases to face this paradox.

Managing the Civil Case

Many defendants will place their criminal matter as a priority and might, therefore, elect to abdicate defending the civil case, especially when the potential criminal charges appear overwhelming. But, the consequences of that approach can be significant. Defendants released from incarceration will still require assets to support them or their families. If the defendant is acquitted at the end of a lengthy trial, assets will be critical as they rebuild their life. Defendants' families, often the innocent spouses and children left to pick up the pieces, are further impacted where the indicted investment broker, for example, essentially forfeits his defense in the civil case and the civil plaintiff collects on its judgment.

The frequency of parallel proceedings in the current environment, coupled with the take-no-prisoners attitude of private parties frustrated by executive malfeasance, means that defense attorneys are compelled, more so than ever, to grapple with the civil case while defending the criminal matter. Merely resorting to the "old saw" that a defendant should not be placed in the unenviable situation of asserting the Fifth Amendment and suffering the adverse inference or defending in the civil case, thereby exposing him to potential self-incrimination, will not be effective for managing the civil exposure.

Courts in the Southern District have held that the choice of testifying or asserting the Fifth Amendment privilege is not offensive to the Constitution, and the discomfort a defendant finds being in this position does not necessarily rise to the level of a deprivation of due process. The choice may be unpleasant, but it is not illegal.[4] Nowhere does this issue

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become more cumbersome for defense counsel than where the civil plaintiff is a private party, such as a former employer or investors. Courts in the Southern District have held that the potential for prejudice is diminished where a private party, not the government, is the plaintiff in the civil action.[5]

The party seeking the stay has the burden of demonstrating its necessity and faces the challenge that courts in this circuit view the stay as an extraordinary remedy, especially where the defendant is under investigation but not indicted. In fact, both federal courts in the Second Circuit and New York state courts alike have consistently held that even where the defendant is the "subject" of a criminal investigation but has not been indicted, the request for a stay can be denied on that basis alone.[6] In other words, in the current era, counsel is compelled to shape a defense strategy in the civil case, even if it is never fully employed.

Moreover, while an indictment is a substantive factor considered by courts, it should not be viewed as a relief for defense counsel. Even where criminal charges are pending, the burden for obtaining a stay of the civil matter brought by a private party is substantial, whether in New York state or federal courts in this circuit.

Challenges in State Court

A motion filed in New York state court is brought pursuant to CPLR 2201. The Appellate Division First Department has a long history of affirming Supreme Court denials of CPLR 2201 motions in the context of parallel proceedings, including where criminal charges are pending. Factors evaluated by the court for a 2201 motion include the risk of inconsistent adjudications; application of proof and potential waste of judicial resources. Additionally, a "compelling factor" considered by the court is whether the defendant has invoked his or her constitutional right against self-incrimination.[7] Unfortunately, for the defendant, merely invoking the Fifth Amendment is not a sufficiently "compelling factor" to warrant a stay of his or her civil matter.

In 2009, in *Fortress Credit Opportunities v. Walter Netschi*, the defendant filed a motion for a stay of the action and a stay of discovery pending a federal criminal investigation and argued that the assertion of the privilege against self-incrimination was a proper basis for precluding discovery.[8] The Supreme Court denied the motion and the Appellate Division affirmed, holding that "assertion of the privilege…is an insufficient basis for precluding discovery" and that the motion court "was not obligated to stay the civil matter" in any event.[9]

> The Constitution does not require a stay of civil proceedings pending the outcome of related criminal proceedings.

In 2002, in *Access Capital v. DeCicco*, the Appellate Division held that the defendant was not entitled to a "stay" pending resolution of a related criminal proceeding on grounds that he had asserted in the civil litigation his privilege against self-incrimination.[10] Distinguishing the court's holding in an earlier decision, *Britt v. International Bus. Servs.*, from the facts before it, the DeCicco court stated that "a discretionary stay is appropriate to avoid prejudice to another party that would result from the assertion of the privilege against self-incrimination by a witness."[11]

In *Britt*, the movant requested a stay pending resolution of a criminal proceeding against a witness who already indicated he would assert his Fifth Amendment privilege in the civil case.[12] The movant argued that the witness' testimony was "critical and necessary" to defend himself in the civil action and without it he would be unable to assert a competent defense. The court held that the prejudice the plaintiff might experience was not as severe as that of the movant without a stay. By contrast, in *DeCicco*, the defendant was the only person affected by his decision to invoke the Fifth Amendment privilege. In other words, the "compelling factor" is the scope of prejudice to a third party created by a person invoking the Fifth Amendment privilege.

The DeCicco court also provided critical perspective on the appellate court's interpretation of the scope of the Fifth Amendment protection. In pertinent part, the court stated: "While a party may not be compelled to answer questions that might adversely affect his criminal interest, the privilege does not relieve the party of the usual evidentiary burden attendant upon a civil proceeding; nor does it afford any protection against the consequences of failing to submit competent evidence."[13]

In other words, the court held that the defendant's assertion of the Fifth Amendment privilege does not require the court to issue a stay and, where the privilege is invoked, the plaintiff is not prevented from moving for summary judgment (and the court from granting it) given the choice of the invoking defendant to refrain from introducing evidence.

Stay Motion in Federal Court

The posture of federal courts on stay motions in parallel proceedings is similar to what can be found in state court practice, if not slightly more pronounced. In 2012, the U.S. Court of Appeals in the Second Circuit, in *Louis Vuitton Malletier v. LY USA*, underscored the court's perspective in this area: (a) a stay of a civil case to permit conclusion of a related criminal prosecution is an extraordinary remedy; (b) the U.S. Constitution "rarely, if ever, requires such a stay;" (c) a defendant has no absolute right not to be forced to choose between testifying in a civil matter and asserting his Fifth Amendment privilege; and (d) the existence of a civil defendant's Fifth Amendment right arising out of a related criminal proceeding does not strip the court in the civil action of its broad discretion to manage its docket. The take-away for defense counsel filing a stay motion in federal

court is that a stay order is no easy feat.

District courts in this circuit often utilize a six-factor test in deciding a stay motion: (1) extent to which the issues in the criminal case overlap with those presented in the civil case; (2) the status of the criminal case; (3) interests of the plaintiff; (4) interests of and burden on the defendant; (5) interests of the court; and (6) the public interest.[14] The Second Circuit has cautioned that these factors can be nothing more than a rough guide. A plausible constitutional argument is presented only, if, at minimum, denying a stay would cause "substantial prejudice" to the defendant. As the Second Circuit wrote in *Louis Vuitton*: "In the more common case, the Fifth Amendment privilege is implicated by the denial of stay, but not abrogated by it."[15]

Decisions in the Southern District of New York certainly demonstrate an embrace of this interpretation of the Fifth Amendment in parallel proceedings. Contrary to what might be intuitive for criminal defense attorneys, implications for a defendant's Fifth Amendment privilege do not always trump the interests of the plaintiff to recover in the civil proceeding. For example, in 2003, in *Karimona Investments v. Weinreb*, the Southern District denied movant's request for a stay and noted that the expense of defending against a grand jury investigation or criminal trial increases the risk that the plaintiff could succeed in the civil matter without being able to collect on any judgment.

Moreover, the Southern District has repeatedly upheld the general view that a defendant's conduct resulting in a criminal charge should not be availed of by him as a shield against a civil suit and prevent a plaintiff from expeditiously advancing its claim.[16] As an alternative, the Southern District, as well as the Second Circuit, has promoted alternative forms of relief, such as tailored stays, protective orders postponing the indicted defendant's testimony and sealing confidential material, while permitting other discovery to proceed.[17] Failure to take advantage of alternatives in the first instance might be viewed as part of a larger effort for overall delay and obfuscation.[18]

> The frequency of parallel proceedings in the current environment, coupled with the take-no-prisoners attitude of private parties frustrated by executive malfeasance, means that defense attorneys are compelled, more so than ever, to grapple with the civil case while defending the criminal matter.

Conclusion

That the defendant in a parallel proceeding can simply keep at bay the civil action on the basis of his or her Fifth Amendment right against self-incrimination is mythical, except in extreme circumstances. In fact, in securities markets, registered brokers facing pending criminal charges that are also sued in Financial Industry Regulatory Authority (FINRA) arbitration cannot obtain a stay, in certain circumstances, without a court order (or consent of the plaintiff). That means the broker must go to court and make an argument for "substantial prejudice" in the absence of the stay. That might be challenging and expensive.

The take-away for defense counsel is that the civil matter must be seriously addressed. The implications of the criminal matter do not outweigh the civil exposure in every instance. If nothing else, the implications of both aspects of the parallel proceeding must be weighed in shaping the totality of the defense strategy.

1. Christopher M. Matthews, "Acquittal Deals U.S. A Rare Court Defeat," Wall Street Journal, July 9, 2014, at C1.
2. See *Sterling National Bank v. A-1 Hotels Intern.,* 175 F.Supp.2d 573 (SDNY 2001).
3. *Arden Way Associates v. Ivan Boesky*, 660 F.Supp. 1494, 1496 (SDNY 1987) (citing *Securities & Exchange Commission v. Dresser Indus.*, 628 F.2d 1368, 1375 (D.C. Cir.).
4. *United States of America v. District Council of New York City*, 782 F.Supp. 920, 925 (SDNY 1992).
5. *JHW Greentree Capital v. Whittier Trust*, No. 05 Civ. 2985 (HB), 2005 WL 1705244 (SDNY 2005).
6. See, e.g., *Karimona Investments v. David Weinreb*, No. 02CV1792WHPTHK, 2003 WL 941404, *3 (SDNY 2003). See also, *Stuart v. Tomasino*, 148 A.D.2d 370, 373 (1st Dept. 1989).
7. *Britt v. International Bus. Servs*., 225 AD2d 143 (1st Dept. 1998).
8. *Fortress Credit Opportunities v. Walter Netschi*, 59 AD3d 250 (1st Dept. 2009).
9. Id.
10. *Access Capital v. DeCicco*, 302 A.D.2d 48 (1st Dept. 2002).
11. Id. at 52.
12. *Britt*, 255 AD2d at 144.
13. *DeCicco*, 302 AD2d at 51.
14. *Louis Vuitton Malletier v. LY USA*, 676 F.3d 83, 99 (2012).
15. *Louis Vuitton*, 676 F.3d at 100.
16. See, e.g., *Travelers Casualty v. Vanderbilt*, No. 01 CIV. 7927, 2002 WL 844345, *4 (SDNY 2002).
17. *Fendi Adele S.R.L. v. Ashley Reed Trading*, No. 06 Civ. 0243, 2006 WL 2585612 (SDNY 2006).
18. See *Louis Vuitton*, 676 F.3d at 102.

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Multilateral Self-Defense in Parallel Proceedings: Practical Steps to Take When the Government Comes Knocking on the Front Door, the Back Door, the Side Door, and the Windows

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We live in a complex legal world. One way that complexity manifests itself is through litigation involving allegations of criminal and actionable (but not criminal) behavior taking place on multiple playing fields at the same time. Some call this governmental coordination of civil and criminal actions. Others call it parallel proceedings. But what we are generally talking about is an effort by the federal government to take advantage of criminal and civil processes to address, in a coordinated fashion, unlawful and damaging conduct. Such coordinated law enforcement, utilizing civil and criminal remedies, raises a host of constitutional, procedural, and strategic issues that are the subject of this presentation and outline.

A. Introduction and overview

1. Parallel proceedings are constitutional

a. *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 52 (1912) ("The Sherman act provides for a criminal proceeding to punish violations, and suits in equity to restrain such violations, and the suits may be brought simultaneously or successively. The order of their bringing must depend upon the government; the dependence of their trials cannot be fixed by a hard-and-fast rule, or made imperatively to turn upon the character of the suit.")

b. *United States v. Kordel*, 397 U.S. 1, 11 (1970) ("[i]t would stultify enforcement of federal law to require a government agency such as the FDA to invariably choose either to forego recommendation of a criminal prosecution once it seeks civil relief, or to defer criminal proceedings pending the ultimate outcome of a criminal trial."). *Kordel* was particularly noteworthy for two reasons. *First*, the Court approved the use of civil discovery in the parallel criminal action. *Second*, the Court explained that while, as a general rule, "[t]he prosecution may use evidence acquired in a civil action in a subsequent criminal proceeding,"

the prosecution presumably would not be able to use such evidence if "the defendant demonstrates that such use would violate his constitutional rights or depart from the proper administration of criminal justice." 397 U.S. at 12-13.

c. *United States v. Fields*, 592 F.2d 638, n. 19 (2d Cir. 1978), lauding the cooperation between the SEC and the United States Attorneys' Office as "commendable" and noting that the "Congress only recently has expressed its expectation that this cooperation will continue: 'Traditionally, there has been a close working relationship between the Justice Department and the SEC. The Committee [on Interstate and Foreign Commerce] fully expects that this cooperation between the two agencies will continue. . . .' H.R.Rep.No. 95-650, 95th Cong., 1st Sess. 10 (Sept. 28, 1977)."

d. *SEC v. Dresser Industries, Inc.*, 628 F.2d 1368, 1376-77 (D.C. Cir. 1980) ("Effective enforcement of the securities laws requires that the SEC and Justice be able to investigate possible violations simultaneously").

e. *United States v. Unruh*, 855 F.2d 1363, 1374 (9th Cir. 1987) ("The prosecution may use evidence obtained in a civil proceeding in a subsequent criminal action unless the defendant shows that to do so would violate his constitutional rights or depart from the proper administration of criminal justice.").

f. *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir. 1995) ("The Constitution does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings.").

g. *United States v. Teyibo*, 877 F.Supp. 846, 855-56 (S.D.N.Y.1995) (use of civil discovery in criminal cases is permissible unless circumstances show bad faith on the part of the government in bringing parallel proceedings such that the government violate[s] his

constitutional rights or depart[s] from the proper administration of criminal justice." The Court delineated the circumstances under which such bad faith exist "include cases in which (1) the Government pursued a civil action solely to obtain evidence for a criminal prosecution; (2) the Government failed to advise the defendant during the civil proceeding that it is contemplating criminal prosecution; (3) the defendant was without counsel; (4) the defendant reasonably feared prejudice from pre-trial publicity or other unfair injury; or (5) other special circumstances suggest that the criminal prosecution is unconstitutional or improper.").

2. But there are limits

a. *United States v. Parrott*, 248 F. Supp. 196 (D.D.C. 1965), a case in which the prosecution attempted to use prior testimony from SEC proceedings, the Court held that ("[the] government may not bring a parallel civil proceeding and avail itself of civil discovery devices to obtain evidence for subsequent criminal prosecution."). *Id.* at 202. What was critical in this case was that the SEC had not disclosed that it had referred the matter to the Justice Department for prosecution.

b. *United States v. Scrushy*, 366 F.Supp. 2d 1134 (N.D.Ala. 2005). In this criminal fraud case, the Court excluded a defendant's deposition testimony obtained during a civil investigation by the SEC. Reason: on the eve of the defendants' deposition, which was to take place in Georgia, the prosecution reached out to the SEC and sought to have the SEC take the deposition in Alabaman so that there would be a jurisdictional basis to prosecute, in Alabama, any false statements made during the deposition. The prosecutor also instructed the SEC to navigate away from topics at the deposition that might reveal the as-yet undisclosed criminal investigation. As a result of this conduct, the prosecutor's close involvement in the deposition preparation, and the government's failure to inform the defendant of the undisclosed

criminal investigation, the Court concluded that the prosecution could not use the deposition in the criminal case. The judge put it this way: "by definition, the separate investigations should be like the side-by-side train tracks that never intersect." 366 F. Supp. at 1139. What occurred, held the Court, was a "depart[ure] from the proper administration of criminal justice ... ." *Id*. Notably, the Court held that it was no excuse that the government "did not outright lie to Mr. Scrushy about the existence of the criminal investigation." *Id*. at 1139-40. Being sneaky, in other words, was not acceptable.

c. *United States v. Stringer*, 408 F.Supp. 2d 1083 (D. Or. 2006), *rev'd*, 521 F.3d 1189 (9th Cir. 2008).

i. *The District Court Decision*. The District Court held that the prosecution could not coordinate with the SEC in a single investigation of criminal and civil dimension and, accordingly, dismissed the indictment. Finding, as in *Scrushy, supra*, that the parallel tracks of an SEC investigation and a criminal investigation impermissibly crossed by virtue of the prosecutions' strong involvement in the SEC's discovery gathering efforts, and finding that the government had sandbagged the defendant by concealing the criminal investigation, the District Court found that it was improper for the U.S. Attorney's Office to build a criminal case on the back of an SEC investigation. The Court, finding that the government "intentionally shielded its intentions behind the guise of a civil prosecution, resorting to subterfuge to maintain the secrecy of its involvement" concluded that "[a] government agency may not develop a criminal investigation under the auspices of a civil investigation ... [and t]he strategy to conceal the criminal investigation from defendants constituted an abuse of the investigative process." *Id*. at 1088-89.

ii. *The Ninth Circuit Reversal.* On appeal, the Ninth Circuit Court of Appeals rejected the view in *Scrushy, supra,* that parallel civil and criminal proceedings must be like two parallel train tracks and never come together, and reversed the lower court's dismissal of the indictment. The Court also blessed joint, inter-agency investigations. The Court held that the SEC investigation was not conducted in bad faith solely to build a covert criminal case, the SEC did not affirmatively mislead the defendant into believing that there would be no criminal prosecution, Form 1662 gives the defendant notice that the information produced in the SEC matter could be used by law enforcement to support a criminal prosecution.[1]

d. *SEC v. Saad*, 229 F.R.D. 90 (S.D.N.Y. 2005). The SEC brought an enforcement action at the same time the U.S. Attorney's Office brought a criminal prosecution involving the same matter. The Court denied the motion of the U.S. Attorney's Office, as an intervenor, to stay the civil action on the ground that the discovery produced would harm the prosecutors' ability to develop their case. Judge Rakoff rejected that argument:

> Although applications for a stay similar to the one here made by the U.S. Attorney are not uncommon in such "parallel proceedings" situations, they are not without their bizarre aspects. It is bewildering enough that Congress has decreed that, even though someone facing the potentially ruinous financial penalties of an SEC civil complaint should be accorded substantial discovery in order to defend herself, the same defendant facing the even more severe penalties of a criminal action should barely receive any discovery at all. But it is stranger still that the U.S. Attorney's Office, having closely coordinated with the SEC in bringing simultaneous civil and criminal actions against some hapless defendant, should then wish to be relieved of the consequences that will flow if the two actions proceed simultaneously.

[1] SEC Form 1662, entitled "Supplemental Information for Persons Requested to Supply Information Voluntarily or Directed to Supply Information Pursuant to a Commission Subpoena," states, in ¶ E.5, concerning testimony, that "[i]nformation you give may be used against you in any federal, state, local or foreign administrative, civil or criminal proceeding brought by the Commission or any other agency." Paragraph E.5 lists 22 possible uses of the information provided to the SEC, including the sharing of materials provided to the SEC with, among others, "other federal, state, local, or foreign law enforcement agencies; securities self-regulatory organizations; and foreign financial regulatory authorities to assist in or coordinate regulatory or law enforcement activities with the SEC."

e. *SEC v. Cioffi*, 2008 WL 4693320 (E.D.N.Y. 2008) (Tab A), where the District Court denied the US Attorney's motion to stay discovery in a civil enforcement proceeding because an insufficient showing had been made to justify such a stay. The Court did, however, leave the door open for the government to renew its request with respect to particular and specific aspects of discovery.

B. Fifth Amendment Issues

1. Only humans have a Fifth Amendment right against self-incrimination; corporations and other entities do not. *See* U.S. Const. Amend. V ("No person. . . shall be compelled in any criminal case to be a witness against himself." *See also Braswell v. United States*, 487 U.S. 99, 110 (1988); *Bellis v. United States,* 417 U.S. 85, 89-91 (1974); *Kastigar v. United States*, 406 U.S. 441 (1972).

2. Any invocation of the Fifth Amendment privilege against self-incrimination may be the subject of an adverse inferences in a civil proceeding, including a concurrently filed civil proceeding.

a. *Baxter v. Palmigiano*, 425 U.S. 306, 318 (1976) ("the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them").

b. *In re Carp*, 340 F.3d 15, 23 (1st. Cir. 2003), where the Court made clear that, "[w]hen all is said and done, the trial court has discretion over whether a negative inference is an appropriate response to the invocation of the Fifth Amendment in a particular civil case."

3. The adverse witness, if invoked on account of an employee's invocation of the Fifth Amendment privilege against self-incrimination, may be attributed to the corporation employing the employee. *Baxter v. Palmigiano*, *supra*.

C. Stay Issues

1. General cases

a. *SEC v. Chestman*, 861 F.2d 49 (2d Cir. 1988), where the Court affirmed a District Court Order granting the government's motion to intervene and stay this civil action pending prosecution of related, concurrent criminal action. The Court observed that, "so far as preparation for the trial in the civil action is concerned, appropriate opportunities for discovery can be allowed when the stay is lifted. Chestman's defense of the civil case is thus not affected. So far as preparation for the criminal case is concerned, Chestman is not entitled to discovery in that proceeding." 861 F.2d at __.

b. *SEC v. Gordon*, 2009 WL 2252119 (N.D. Okla. 2009) (Tab B). The court applied the Worldcom six-factor test to rule that a stay was appropriate because the parallel civil and criminal cases overlapped, Gordon had already been indicted and a stay was in the interest of both the SEC and the public.

2. Government requests for stays

a. *SEC v. Saad*, *supra*.

b. *SEC v. Cioffi*, *supra*,

c. *SEC v. Fraser*, No. 2:09 Civ. 443, 2009 WL 1531854 (D. Ariz. 2009) (Tab C) (District Court rejected the United States Attorney's request to stay the civil action that had been commenced along with a criminal case because no showing of "substantial prejudice" was made by the United States Attorney's Office. As in *SEC v. Cioffi, supra*, the Court held that the government could obtain a stay on a renewed motion if a sufficiently particularized showing were made.

d. *SEC v. Kornman*, No. 3:04 Civ. 1803, 2006 WL 1506954 (N.D. Tex. 2006) (Tab D) (District Court adopted magistrate judge's denial of the government's motion to stay the civil SEC action because the government had not shown "substantial and irreparable prejudice" if a stay were not entered.").

e. *SEC v. Nicholas*, 569 F. Supp. 2d 1065 (C.D. Cal. 2008). Here, the Court focused on the SEC's duty to bring civil enforcement actions and "protect the integrity of the public markets and ensure truthful corporate disclosures." The government's motion for a stay was granted to facilitate the government's regulatory and law enforcement efforts.

3. Defendants' attempts to stay

a. *SEC v. Dresser Industries*, *supra*.

b. *In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes*, 62 F.3d 1222 (9th Cir. 1995)

D. Other Discovery Issues

1. Motion for protective order precluding the government in a civil action from sharing discovery with a prosecutor pursuing a parallel criminal investigation. The Courts have the power to issue protective orders precluding the disclosure of discovery obtained in a civil case to the prosecution in a parallel criminal case. Whether that power is exercised depends on the facts and circumstances of the individual case.

a. *Minpeco S.A. v. Conticommodity Services, Inc*., 832 F.2d 739 (2d Cir. 1987).

b. *In re Grand Jury Subpoena*, 836 F.2d 1468 (4th Cir.), *cert denied,* 487 U.S. 1240 (1988).

c. *In re Grand Jury Proceedings*, 995 F.2d 1013 (11th Cir. 1993).

d. *In re Grand Jury Subpoena*, 62 F.3d 1222 (9th Cir. 1995).

2. Parallel proceedings and *Brady*

a. The government's obligation to disclose exculpatory information in a criminal action is well-settled. *See Brady v. Maryland*, 373 U.S. 83 (1963), where the Court made clear the prosecutions' affirmative obligation to disclose exculpatory information to defense counsel before trial.

b. Where there is a joint investigation between a U.S. Attorney's Office and a civil branch of the federal government, such as the Securities and Exchange Commission or the Commodity Futures Trade Commission, the U.S. Attorney's Office must disclose exculpatory information in the possession of civil investigators. *See United States v. Upton*, 856 F. Supp. 727, 750 (E.D.N.Y. 1994 ("The inquiry is not whether the United States Attorney's Office physically possesses the discovery material; the inquiry is the extent to which there was a 'joint investigation' with another agency."). *See also United States v. Wood*, 57 F.3d 733, 735 (9th Cir. 1995) ("[t]he government cannot with its right hand say it has nothing while its left hand holds what is of value.").

c. Two recent cases:

- *United States v. Gupta*, 848 F. Supp. 2d 491 (S.D.N.Y. 2012) (prosecution ordered to conduct a Brady/Giglio[2] review of the SEC interview memoranda of 44 witnesses who had been jointly

[2] In *United States v. Giglio*, 405 U.S. 150 (1972), the United States Supreme Court held that the government's *Brady* obligation extends to non-prosecution promises to a government witness by one prosecutor even if unknown by another prosecutor. In other words, it does not matter whether any given prosecutor personally knows that the government is in possession of exculpatory material. As the Court explained, "whether the nondisclosure [of exculpatory information] was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government." 405 U.S. at 154.

interviewed by DOJ and the SEC. In so ruling, the Court observed that the government's Brady/Giglio obligations extend to joint "investigations" even if there is no joint "prosecution." *Id*. at 494-95. The Court addressed the government's practical objections as follows: "any argument that the Government's duty does not extend so far merely because another agency, not the USAO, is in actual possession of the documents created or obtained as part of the joint investigation is both hypertechnical and unrealistic." *Id.* at 493 (quoting *United States v. Shakur*, 543 F. Supp. 1059, 1060 (S.D.N.Y. 1982)).

- *United States v. Martoma*, No. 12 Cr. 973 (PGG), 2014 U.S. Dist. LEXIS 1566, 2014 WL 31708 (S.D.N.Y. January 5, 2014) (Tab E). In this important inside trading case, the Court held that if a civil agency prepares memoranda for its own internal purposes and does not share those memoranda with the U.S. Attorneys' Office, it would be a due process violation for the U.S. Attorneys' Office not to share those memoranda with defense counsel. Once the Court determined that the SEC and the U.S. Attorneys' Office were conducting a joint investigation, the government became obligated under *Brady* and *Giglio* to disclose all exculpatory information, even if not in the possession of the U.S. Attorneys' Office but only in the possession of the SEC.

E. Recent case study in parallel proceedings: *United States v. Mission Settlement Agency* and *Consumer Finance Protection Bureau v. Mission Settlement Agency*

The hypothetical case study that we will be using to discuss these topics at the Section Annual Conference bears some similarity to a recent pair of parallel proceedings: *United States v. Mission Settlement Agency,* 13 Crim. 327 (S.D.N.Y.) and *Consumer Finance Protection Bureau v. Mission Settlement Agency,* 13 Civ. 3064 (S.D.N.Y.). Copies of the Grand Jury indictment, the civil complaint by the Consumer Finance Protection Bureau (the "CFPB"), and comments by United States Attorney Bahara are Tabs F, G, and H respectively. This case involves what was reportedly the first indictment arising out of a CFPB referral. It will be interesting to see whether other parallel proceedings involving this agency and federal prosecutors, which was established as a result of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. Pub. L. No. 111-203, § 1011, 124 Stat. 1376, 1964 (2010), will follow. It will also be interesting to see whether the federal government's internal guidance to its staff changes as more and more parallel proceedings are brought and the law continues to develop.[3]

[3] In this regard, *see* Tab I, pertinent portions of the SEC's current Enforcement Manual, dated October 9, 2013.