STAYING OUT OF TROUBLE: THE BASICS EVERY CIVIL LITIGATOR SHOULD KNOW ABOUT STAYING CIVIL PROCEEDINGS WHEN ONE OF THE PARTIES FACES CRIMINAL EXPOSURE

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Litigation and Dispute Resolution Alert

By: Clifford C. Histed

OVERVIEW

Most civil litigators successfully avoid having to address criminal matters, but sometimes the collision of civil and criminal worlds cannot be avoided. For instance, you may represent a financial adviser being sued by a disgruntled investor who claims your client operated a Ponzi scheme. The government may also be interested in your client's investment activities, giving rise to the possibility of criminal charges. Alternatively, you may represent a corporation that wants to sue a corporate executive who improperly used company funds, but the government may be looking at criminal charges against that executive as well.

When a party in civil litigation in federal or state courts faces criminal exposure, the dynamics of the civil litigation can shift. The party facing criminal exposure must consider whether statements he/she makes or positions he/she takes in the litigation will be used against him/her in any potential or pending criminal proceedings. In contrast, the opposing party may seek to press an advantage to force his/her opponent to fight a war on two fronts. If you represent a client in civil litigation who is under criminal investigation for related conduct or if you represent a client suing someone for misconduct that could be viewed as criminal by the authorities, you must be prepared to navigate the issues that will likely be generated by a parallel criminal matter.

This article discusses one way in which a parallel criminal matter will significantly affect civil litigation. When a party faces criminal exposure related to conduct at issue in civil litigation, that party can request a stay of the civil litigation until the criminal matter is resolved. However, stays are not guaranteed. We will examine the factors courts generally consider and provide considerations for the litigator regardless of whether he/she represents the party seeking a stay or opposing one.

STAYING CIVIL PROCEEDINGS

In a criminal case, an individual defendant has a right against self-incrimination. This right is enshrined in the Fifth Amendment, which provides in relevant part “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”[1] Absent a stay, a party in a civil case who faces criminal charges must either invoke his/her Fifth Amendment privilege during discovery, which could result in an adverse inference,[2] or waive his/her Fifth Amendment privilege, which could impair his/her defense of the criminal case.

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A civil stay avoids this Hobson's choice by allowing a litigant to focus on the criminal charges.[3]

However, "[t]he Constitution does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings."[4] Courts have discretionary authority to stay civil litigation in light of parallel or related criminal proceedings.[5] Whether a court will stay the civil proceedings is a highly fact-specific inquiry, but courts consider first "the extent to which the defendant's Fifth Amendment rights are implicated."[6] Courts also consider the following five factors to determine whether a civil case should be stayed: (1) the plaintiff's interest in moving forward with the civil litigation, and the potential prejudice to the plaintiff caused by delay; (2) the burden on the defendant caused by the proceedings; (3) judicial efficiency; (4) the interests of nonparties; and (5) the public interest in the pending civil and criminal litigation.[7]

Courts apply these factors on a case-by-case basis, but there are some general considerations courts review when determining whether to grant a stay.

Implications of the Fifth Amendment Right and Burden on the Defendant

A defendant[8] seeking the stay should emphasize the factual similarity between the criminal proceeding and the civil proceeding. "[T]he strongest case for deferral of proceedings until after completion of criminal proceedings is where a party under indictment for a serious offense is required to defend a civil or administrative action involving the same matter."[9] Even where criminal charges have not been filed but the government is investigating potential criminal conduct, a court may grant a stay. The fact that criminal charges are not yet pending is not dispositive. "[T]he right to assert one's privilege against self-incrimination does not depend upon the likelihood, but upon the possibility of prosecution."[10] Nevertheless, if criminal charges have not been filed, the burden on the defendant is not as great; therefore, his/her case for a stay is not as compelling.[11]

A plaintiff opposing a stay should emphasize any dissimilarity between the criminal matter and the civil case. This might also include explaining why no possibility of criminal charges exists if no criminal charges are pending. In addition, the plaintiff should consider whether the defendant has waived his or her Fifth Amendment privilege through some prior action (e.g., by filing an answer or responding to discovery requests). A plaintiff should also keep in mind that only individual persons can claim Fifth Amendment rights. The Fifth Amendment does not provide the right against self-incrimination to corporations.[12]

Plaintiff's Interests in Proceeding with the Civil Case & Judicial Efficiency

A plaintiff will normally argue that he/she has a strong interest in favor of an expeditious resolution of civil case, regardless of the potential prejudice to the defendant. Important to this factor is whether evidence will become lost or stale, or whether resolution of a criminal case will aid the plaintiff's civil action. Similarly, it is important to consider whether criminal charges have been filed or if they are a mere possibility. A stay when criminal charges are only a possibility places a larger burden on the plaintiff because the stay may last many months, if not years.

But granting a stay may actually reduce the burden on the civil plaintiff. It is possible that a resolution of a pending criminal case could benefit a plaintiff if the plaintiff is also the victim in the criminal case and if the resolution involves an admission of guilt. This argument ties in with the judicial efficiency factor. Staying a civil case early and allowing the criminal case "to proceed first may narrow the issues and streamline discovery in the civil proceeding, and collateral estoppel based on findings in the criminal case may expedite resolution of the civil case."[13] These developments will actually benefit a plaintiff in its civil case by reducing the plaintiff's burden of proof and litigation costs.

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Interest of the Public and Nonparties

In considering the interest of the public, courts balance the interest of the public in expeditious resolution of civil litigation against the public's interest in ensuring the criminal process is not subverted by the ongoing civil case. “[W]here there are parallel criminal and civil proceedings, 'the criminal case is of primary importance to the public,' whereas the civil case, which will result only in monetary damages, 'is not of an equally pressing nature.'”[14] Whether the public interest will favor either party will depend on the unique facts of a particular case, but, typically, the “protection of defendant's constitutional rights against self-incrimination is the more important consideration.”[15] Similarly, whether any nonparty interest is implicated will depend on whether a nonparty stands to benefit from the civil litigation or is otherwise impacted by it.

Additional Considerations

Whether you represent the party requesting a stay or opposing a stay, there are additional considerations to keep in mind. For instance, if you represent a plaintiff about to file a complaint against multiple defendants, consider crafting the case without reliance on any statements from the party facing criminal proceedings. Additionally, if you believe a court is likely to grant a stay, seek to limit the stay either in terms of duration or scope.[16] It is possible that a court will merely stay civil discovery as to particular defendants or particular issues depending on the facts of the case. Similarly, a court may limit the scope of the stay and require a status conference at regular intervals to reassess whether the stay should remain in place. “A stay with a limited duration . . . is more likely to be granted than an indefinite one.”[17]

CONCLUSION

Staying a civil case is just one consideration when a parallel criminal matter is underway. But it is an important one. Whether you represent a plaintiff or defendant in civil litigation, it is important to understand how a court will review a request to stay civil proceedings and how it will apply the multifactor test. Understanding these factors and the various arguments parties can raise is critical to guide the court to the correct decision.

FOOTNOTES

[1] U.S. CONST. amend. V.

[2] *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976).

[3] *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 326 (9th Cir. 1995); *Square 1 Bank v. Lo*, No. 12-CV-05595-JSC, 2014 WL 7206874, at *1 (N.D. Cal. Dec. 17, 2014) (“Indeed, calling the predicament a 'Hobson's choice,' courts have stayed discovery where a civil defendant has already pleaded guilty to a criminal indictment and awaits sentencing . . . .”).

[4] *Keating*, 45 F.3d at 324 (9th Cir. 1995); *see also SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1375 (D.C. Cir. 1980).

[5] *Microfinancial, Inc. v. Premier Holidays Int'l, Inc.*, 385 F.3d 72, 77 (1st Cir. 2004).

[6] *Keating*, 45 F.3d at 324.

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[7] *Id*. at 324–25.

[8] This article refers to the party seeking the stay as defendant for convenience, but it is possible that the plaintiff in a civil case may seek a stay.

[9] *Square 1 Bank*, 2014 WL 7206874, at *1 (alteration in original) (quoting *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1375–76 (D.C. Cir. 1980)).

[10] *Slagowski v. Central Wash. Asphalt*, 291 F.R.D. 563 (D. Nev. July 2, 2013) (quoting *Hoffman v. United States*, 341 U.S. 479, 4860487 (1951)).

[11] *See Doe v. Sipper*, 869 F. Supp. 2d 113, 116–17 (D.D.C. 2012) (collecting cases stating that the lack of an indictment makes the case for a stay weaker).

[12] *Braswell v. United States*, 487 U.S. 99, 104 (1988).

[13] *SEC v. Alexander*, No. 10-cv-04535-LHK, 2010 WL 5388000, at *5 (N.D. Cal. Dec. 22. 2010) (internal citations omitted).

[14] *Square 1 Bank*, 2014 WL 7206874, at 5 (emphasis in original) (quoting *Alexander*, 2010 WL 5388000, at *6).

[15] *United Techns. Corp. v. Dean*, 906 F. Supp. 27, 29 (D. Mass. 1995) (internal quotation omitted).

[16] *See* Judge Milton Pollack, Parallel Civil & Criminal Proceedings, 129 F.R.D. 201, 211 (1989) (“[A] general stay of all civil discovery is not by any means the best option available to the court or to the litigants. A stay can and should be tailored to avoid undue prejudice.”)

[17] *Doe*, 869 F. Supp. 2d at 118.

KEY CONTACTS



CLIFFORD C. HISTED
PARTNER

CHICAGO
+1.312.807.4448
CLIFFORD.HISTED@KLGATES.COM

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