

abtl REPORT

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Multidistrict Litigation and Class Actions

On March 3, 1998, the United States Supreme Court decided *Lexecon Inc. v. Millberg Weiss Bershad Hynes & Lerach*, 118 S.Ct. 956 (1998). The case involved the interpretation of 28 U.S.C. § 1407(a), which permits the Judicial Panel on Multidistrict Litigation ("JPML") to transfer cases with common issues of fact to a single court for pretrial purposes. In

Lexecon, the Supreme Court ended the longstanding practice of allowing the transferee court to retain jurisdiction over the transferred actions for purposes of trial. *Id.* at 962. The Court held that § 1407(a) allows the JPML to transfer cases for pretrial proceedings only. At the close of such pretrial proceedings, § 1407(a) requires the JPML to remand to its originating court any case that has not already been terminated. *Id.* The Court thus applied a literal reading of the statute to end a practice that had been adopted by hundreds of federal courts. In so doing, however, the

Court provided no guidance as to how the plain language of the statute can be applied to class action litigation. Consequently, the impact of the *Lexecon* decision on the scores of putative class actions that have been transferred by the JPML is far from clear.

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Lori A. Schechter

Parallel Proceedings: Criminal and Civil Litigation

In high school geometry class we learned that parallel lines never meet. If only that were so in the world of litigation.

The phrase "parallel proceedings" refers to simultaneous or successive legal proceedings involving the same facts or parties. The usual three litigation tracks along which your client may have to proceed simultaneously are (1) civil litigation by the government or private parties (either direct actions or shareholder derivative actions), (2) criminal investigation or proceedings by federal or state authorities, and (3) administrative proceedings by federal, state, or local government agencies. Of course, these proceedings are not truly "parallel" in the way our high school geometry teacher defined the term. Rather, they intersect at a target, the alleged principal wrongdoer, which may be the person or company which has contacted you for representation.

The last several years have seen an increase in regulation of industry, publicly through state and federal legislation and privately through aggressive litigation. The result has been an increase in the number of parallel proceedings. Civil defendants today in cases involving securities fraud, financial institution fraud, business fraud, healthcare fraud, antitrust violations, environmental torts, labor/ERISA issues, or trade secret/piracy issues, increasingly find themselves facing the scrutiny of criminal investigations or administrative proceedings while they simultaneously try to defend the civil litigation. Indeed, sophisticated general counsel of corporations who are victims of business torts may affirmatively enlist the aid of criminal or administrative regulators to redress perceived wrongs (and, perhaps, to gain

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On Multidistrict Litigation

Petitioners in *Lexecon* were a law and economics consulting firm and one of its principals (collectively "Lexecon"). Respondents were the law firms of Milberg Weiss Bershad Hynes & Lerach ("Milberg Weiss") and Cotchett, Illston & Pitre ("Cotchett"). The dispute arose out of the class action lawsuits against Charles Keating and the American Continental Corporation ("ACC") in connection with the failure of Lincoln Savings. The suits, which charged violations of federal securities laws and RICO, were filed by investors in numerous federal district courts. These cases were eventually consolidated under the multidistrict litigation rules and transferred to the District of Arizona. Milberg Weiss, along with Cotchett and others, represented the consolidated plaintiff class.

In 1991, the plaintiffs in the ACC/Lincoln action amended their complaint to add Lexecon as a defendant. The amended complaint alleged that Lexecon had been retained by ACC/Lincoln to write reports advocating the financial stability of Lincoln's operations and the value of ACC/Lincoln's assets. In June 1992, after the ACC/Lincoln trial started, but before a verdict was rendered, Lexecon and the plaintiffs "resolved" the claims against Lexecon and Lexecon was dismissed without prejudice.

In November 1992, Lexecon brought a diversity action in the Northern District of Illinois against Milberg Weiss and Cotchett for defamation, malicious prosecution, and other torts. The defendant law firms sought and obtained transfer of the action under § 1407(a) to the District of Arizona, where a portion of the consolidated actions in the ACC/Lincoln proceedings still remained. After over a year of pretrial proceedings in Arizona, during which time all other parties in the coordinated proceedings reached a settlement, Lexecon twice filed motions seeking remand for trial to the Northern District of Illinois. These motions were denied. Instead, the Arizona court entered a dismissal with prejudice of the action against the Cotchett firm pursuant to Fed. R. Civ. P. 54(b), and granted Milberg Weiss' motion, pursuant to 28 U.S.C. § 404(a), to assign the case to itself for trial. In *Re American Continental/Lincoln Savings & Loan Securities Litigation*, 884 F. Supp. 1388.

Lexecon's defamation case against Milberg Weiss went to trial in the District of Arizona. The jury rendered a verdict in favor of Milberg Weiss. Lexecon appealed to the Ninth Circuit, challenging, among other things, the Arizona court's authority to deny remand to the Northern District of Illinois, and its authority to transfer the action to itself for trial. Specifically, Lexecon argued that the language of § 1407(a) required remand to the original district for trial. As the statute states in relevant part:

When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Each action so transferred *shall be*

remanded by the panel at or before the conclusion of such pretrial proceedings to the district court from which it was transferred *unless it shall have been previously terminated* (emphasis added).

The Ninth Circuit, in a 2-1 vote, rejected Lexecon's argument and affirmed the district court's order transferring the action to itself for trial. In *Re American Continental/Lincoln Savings & Loan Securities Litigation*, 102 F.3d 1524. The majority reasoned that permitting a transferee court to transfer a case to itself upon completion of its pretrial work often promoted efficiency. It eliminated the time required for a new judge to become acquainted with the case and it prevented duplicative or conflicting rulings. *Id.* at 1532. They also reasoned that, because the transferee court is empowered to dispose of the transferred case by summary judgment or dismissal, by analogy it had the power to dispose of the case by trial. *Id.* at 1532-1533. The Ninth Circuit also criticized Lexecon's failure to address its request for remand directly to the JPML, suggesting, but not explicitly holding, that failure to do so constituted waiver. *Id.* at 1534.

In dissenting, Judge Kozinski maintained that the language of the statute "is clear as sunlight" that if the case is to be tried "it must go back from whence it came." *Id.* at 1540. Judge Kozinski argued that a plaintiff's choice of forum for trial was entitled to substantial deference, and that the practice of "self-transfer" for judicial economy destroyed the plaintiff's forum choice.

The Supreme Court reversed the Ninth Circuit's judgment. In an opinion written by Justice David Souter, the Court unanimously held that the mandatory language of § 1407(a) required the JPML to remand each transferred action at the conclusion of pretrial proceedings to the district in which it was originally filed for trial of the action. The Court relied solely on its statutory interpretation of § 1407(a), and did not address the efficiency rationale offered by the Ninth Circuit. Addressing the respondents' argument that the transferee court's authority to conduct coordinated or consolidated pretrial proceedings should include the authority to grant transfer orders under § 1404(a), the Supreme Court stated that such a reading of the transferee court's power would swallow the remand requirement altogether. Thus, the Court held that a transferee court is not empowered to grant such transfers at all, whether to itself or to another jurisdiction. The Court also rejected the Ninth Circuit's criticism of Lexecon for failing to file a motion for remand with the JPML instead of the Arizona district court. Because the JPML has a mandatory duty to remand every MDL case for trial, Lexecon was under no obligation to file a motion with the JPML to preserve this right. *Lexecon*, 118 S. Ct. at 962, n1. Finally, the Court held that the jurisdictional error was so substantial that it could only be remedied by remand and further proceedings, because § 1407(a) categorically limits the power of the courts and the JPML to "override a plaintiff's choice" of venue. *Id.* at 965.

Importantly, the *Lexecon* case was not a class action,

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so the decision does not address the issues that arise in multidistrict class actions. When the same or substantially similar class actions are filed in multiple jurisdictions, the JPML routinely transfers all such actions to a single district pursuant to § 1407(a). If, as part of its pretrial proceedings, the transferee court certifies a nationwide class, how can the transferee court then remand for trial each of the original putative class actions to their original districts? Yet, literal reading of § 1407(a) would require precisely that. Under such circumstances, multiple district courts and juries would be asked to adjudicate the rights of the same certified class, presumably relying on the same discovery and witnesses. The serious risk of inconsistent adjudications, not to mention the lack of judicial economy, is obvious.

The common practice of filing a consolidated complaint in the transferee court likewise raises questions. If the plaintiffs in the various transferred class actions file a consolidated complaint, does this amend and supersede all prior complaints filed in the original jurisdictions? And, if so, does it eviscerate the ability of any one of the underlying class actions to be remanded to its original jurisdiction? Further, district courts commonly require plaintiffs in multidistrict litigation to file a consolidated complaint. Could a district court require the plaintiffs to file a consolidated complaint if it effectively eliminates each class representative's right to her original forum selection?

The efficiency rationale that lower courts applied before the Supreme Court's decision in *Lexecon*, to allow transferee courts to oversee transferred cases through trial, seems particularly well-suited to class action multidistrict litigation. In such cases, once a nationwide class is certified, adjudication by a single court, indeed the court which presided over all pretrial proceedings, makes the most sense. In fact, the transfer statute expressly provides that the JPML has the authority, with or without the parties' consent, to transfer antitrust cases brought by any attorney general of a state under § 4C of the Clayton Act to a single court for pretrial proceedings and trial. 28 U.S.C. § 1407(h). Section 1407(h) implicitly recognizes that these cases are best managed by a single court for all purposes, including trial. This rationale applies equally to class actions.

It is unclear whether courts facing this question in the class action context will feel bound by the *Lexecon* decision or will carve out a judicial exception. If the courts apply the mandatory language of § 1407(a) to class action litigation, the only avenue for resolving the practical problems created will be an act of Congress to create an express exception for class actions. Until either the courts or Congress acts, the impact of the *Lexecon* decision on the scores of putative class actions that have been transferred by the JPML remains uncertain.

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Parallel Proceedings

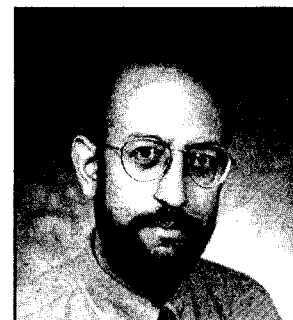
leverage for civil litigation).

Much has been written on the topic of parallel proceedings. The following synopsis is intended to highlight several important areas which deserve close and careful attention by a litigator caught in the crossfire of parallel proceedings.

The Pressure Points

The following list of potential problems in parallel criminal, civil or administrative proceedings is by no means exhaustive.

- Your client may not be in a position to give a deposition in a pending civil case, because his testimony could be used against him in a pending criminal case.
- Your client may need to invoke his Fifth Amendment privilege in pleadings in the civil case (such as the Answer or discovery responses) in order to avoid making admissions usable in the criminal case.
- Asserting Fifth Amendment defenses necessary for the criminal case may have an adverse impact on the civil case, because of evidentiary sanctions or the drawing of adverse inferences.
- The criminal prosecutor and civil plaintiffs' counsel may join forces. Plaintiffs' counsel may share deposition transcripts and investigation results with prosecutors, and prosecutors may, to a more limited extent, share investigation results and theories with plaintiffs' counsel. Federal prosecutors are subject to the restrictions of Federal Rule of Criminal Procedure 6(e), which guards the secrecy of grand jury proceedings. Rule 6(e) does not, however, preclude informal communications by the federal prosecutor concerning information from sources other than the grand jury, including any materials seized during a search of your client's business (or home). Also, state prosecutions may be governed by different rules. In California, grand jury transcripts are publicly available once charges have been filed, and state prosecutors may therefore be more likely to work cooperatively with plaintiffs' counsel.
- Civil plaintiffs may subpoena or otherwise seek to discover material from criminal investigators. See, e.g., *In Re Motion to Unseal Electronic Surveillance Evidence (Smith v. Lipton)*, 990 F.2d 1015 (8th Cir. 1993) (an 8-5 *en banc* decision, denying disclosure of government wiretap information to civil litigants in RICO action).
- The civil plaintiff may be able to use your client's criminal plea as an admission in the civil case.
- Your client's insurance carrier may balk at funding



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your client's defense in the civil case because the presence of criminal charges creates an inference that your client's conduct was intentional and criminal, and therefore excluded from coverage.

- Financial resources which would otherwise be committed to defending the civil case may need to be diverted to defending the criminal case.
- The presence of a criminal investigation or an administrative proceeding will require the retention of additional counsel skilled in these areas, as well as additional counsel for individual employees or officers, resulting in increased costs and coordination difficulties.
- The financial and emotional pressures of parallel proceedings may increase settlement pressure on your client in both the civil and criminal cases.
- The federal sentencing guidelines for individuals and for organizations place a premium on cooperation with federal authorities, creating incentives for self-reporting and for reporting of wrongdoing of others. Pressure to take advantage of these provisions on the criminal side may create or increase exposure for civil liability.
- Voluntary disclosure programs with government agencies to avoid or minimize punishment in suspension or debarment proceedings may also be at odds with strategic decisions in the criminal and civil cases. Similarly, the demonstration of "present responsibility" in order to minimize suspension and debarment sanctions may require corporate actions (e.g., termination of employees) which could have negative ramifications in civil litigation.

The criminal defense attorney who is an eternal optimist may identify a few potential strategic advantages in the presence of parallel proceedings:

- The criminal case may provide a valid ground to stay all or part of the pending civil proceedings.
- The civil case may provide a forum to obtain discovery which might not otherwise be available in the criminal case.
- The work product generated in the investigation and preparation of the civil case, which may be funded by insurance carriers, may be transferable for use in the criminal case.
- In some instances, insurance carriers may be persuaded to fund, at least partially, the defense of a criminal case, on the theory that the outcome of the criminal case will potentially have an impact on the civil case, or on the theory that the work product generated can be used in the defense of both the criminal and the civil case.
- The civil plaintiff's awareness that available funds are being spent on the criminal case may spur an earlier and more favorable civil settlement, before assets are gone.
- A successful civil settlement may provide arguments to present to criminal prosecutors, or to suspension and debarment officials, for a declination or for decreased penalties based on adequate

restitution to the "victims." Compare California Penal Code §§ 1377-1378 (certain criminal offenses may be discharged with the court's permission following civil settlement).

The Privilege Against Self-Incrimination

Perhaps no single issue relating to "parallel proceedings" creates as much concern to civil attorneys as the propriety and consequences of exercising one's Fifth Amendment privilege in a civil case. Fifth Amendment issues are at the core of the usual disputes which arise between civil and criminal counsel in parallel proceedings: the criminal counsel will invariably counsel that their client cannot possibly testify or provide evidence, and civil counsel will moan that the client's testimony is critical to defend the civil case and to avoid evidentiary sanctions or adverse inferences.

The Privilege As Applied To An Individual. An individual cannot be compelled to answer any question which may incriminate him, *Ullmann v. United States*, 350 U.S. 422, 426 (1956), or which might provide a "link in the chain" of evidence necessary to incriminate him. *Hoffman v. United States*, 341 U.S. 479, 486 (1951). The protection of the Fifth Amendment's privilege against self-incrimination is not limited to criminal proceedings, and extends to civil and administrative proceedings, *Kastigar v. United States*, 406 U.S. 441, 444 (1972). It applies in both federal and state proceedings, and may be asserted by a witness who fears prosecution by either federal or state authorities. *Malloy v. Hogan*, 378 U.S. 1, 11 (1964); *Murphy v. Waterfront Com'n of New York Harbor*, 378 U.S. 52, 77-78 (1964).

The privilege may be invoked in civil proceedings even where there are no criminal charges pending, and even where the risk of criminal prosecution is "remote." *In Re Corrugated Container Antitrust Litigation*, 620 F.2d 1086, 1091 (5th Cir. 1980), cert. denied, 449 U.S. 1102 (1981). The privilege may be asserted in civil proceedings even where the witness has received informal "assurances" that he will not be criminally prosecuted. *Estate of Fisher v. C.I.R.*, 905 F.2d 645, 649-50 (2d Cir. 1990); *Belmonte v. Lawson*, 750 F. Supp. 735, 737-38 (E.D. Va. 1990). The privilege may be asserted in a civil proceeding even after the witness has been criminally convicted, if the possibility for further prosecution remains open. *Kemmerer Bottling Group v. Central Truck Parts Co.*, 717 F. Supp. 552, 553 (N.D. Ill. 1989). Compare *Securities and Exchange Com'n v. Rehtorik*, 755 F. Supp. 1018, 1019 (S.D. Fla. 1990) (suggesting that Fifth Amendment rights of civil litigant will expire at the time the litigant receives his criminal sentence).

The privilege against self-incrimination also prevents compulsory production of an individual's personal documents, if the act of production is "testimonial in nature" and therefore incriminating. *United States v. Doe*, 465 U.S. 605, 612-14 (1984) (court finds that for a sole proprietor to produce documentary records would constitute an implicit admission of possession, control, and authenticity of the records). Where such "act of production" issues exist, prosecutors will often

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On INSURANCE

Does an insurance carrier with a duty to defend also have an obligation to pay for counterclaims? No California state court has addressed this issue to date. The California Supreme Court's recent decision in *Aerojet-General Corp. v. Transport Indemnity Co.*, 17 Cal. 4th 38 (1997), however, provides some indirect guidance. The answer is yes, perhaps fully in some cases, and at least in part in most cases.

Let's assume Company A sues a competitor, Company B (the insured) for breach of contract, trademark infringement, patent infringement and product disparagement, at least some of which trigger a duty to defend. Company B responds with a counterclaim for breach of contract and attempted monopolization and an answer asserting these claims as affirmative defenses.

Counsel for the insured may have justifiably concluded that the only way to defend the lawsuit is to pursue the counterclaims. This may be true not just because they are compulsory counterclaims, but because Company A has deeper pockets and is using the lawsuit to try to drive the insured out of business. The threat of offsetting damages, a broader range of discovery, and challenges to Company A's credibility offered by the counterclaims may be the best leverage to bring Company A to a reasonable settlement or to convince a jury not to find Company B liable at all.

Coverage for Counterclaims

The carrier will almost certainly refuse to pay for any work relating to the counterclaim, on the grounds that such work is not the defense of claims for damages, but the prosecution of the insured's own claims. But isn't that position an elevation of form over substance? Few would doubt the defense counsel's judgment that filing the counterclaims was a necessary part of the defense. Failing to bring them would force Company B to defend the suit with one hand tied behind its back. If the counterclaims are a necessary part of the defense of the lawsuit, why shouldn't the carrier, obliged to act in good faith to defend the suit in full, pay for the counterclaims?

At least one unpublished decision has concluded that the carrier must pay to prosecute counterclaims. In *Aerosafe International, Inc. v. ITT Hartford of the Midwest*, 1993 U.S. Dist. LEXIS 10443 (N.D. Cal. 1993), the court held that a carrier defending a trade secrets action was obligated to pay for an antitrust cross-complaint and a separate federal antitrust complaint. The court concluded that these counterclaims were an integral part of the insured's overall defense strategy. *Id.* at *5.

Aerojet suggests that the California Supreme Court might agree. In *Aerojet*, one issue was whether the insured's "site investigation costs" are defense costs that the carrier must pay. The *Aerojet* Court held that they are covered defense costs if they amount to "a reasonable and necessary effort to avoid or at least

minimize liability," as determined under an objective standard. 17 Cal. 4th at 62.

The *Aerojet* test is one that could apply equally to the carrier's obligation to pay for counterclaims. If, viewed objectively, the counterclaims are a reasonable and necessary effort to avoid or minimize liability, the carrier ought to pay for them. In the hypothetical above, the test would be satisfied. Any reasonable defense attorney would conclude that the insured must pursue available counterclaims, especially compulsory ones, in order to avoid or minimize liability, either by leveraging a reasonable settlement, by offsetting damages at a trial, or even by convincing a jury not to find Company B liable.

Aerojet also provides an alternative approach, one that the California Supreme Court seems likely to adopt as a minimum rule. A second issue in *Aerojet* was whether an insured who is uninsured for one or more years of a claim that spans many years must contribute to the costs of defense. The Supreme Court answered that question by extending its decision in *Buss v. Superior Court*, 16 Cal. 4th 35 (1997), where the Court had held that a carrier must defend the entire action if any part of it is potentially covered, subject to the carrier's right at the end of the case to seek reimbursement of amounts allocable solely to noncovered claims. *Aerojet* extended *Buss* to hold that a carrier must defend entirely a claim involving continuing injury, even if the insured is uninsured for some period of time, subject to the carrier's right to seek reimbursement of amounts it can prove are allocable solely to the uninsured years. 17 Cal. 4th at 71. It is a short step to apply that rule to counterclaims. In fact, one federal decision has applied the *Buss/Aerojet* rationale to a carrier's obligation to pay for counterclaims. See *Etchell v. Royal Ins. Co.*, 165 F.R.D. 523, 562-564 (N.D. Cal. 1996).

The California Supreme Court seems likely at minimum to extend *Buss* and *Aerojet* to the costs of counterclaims. The carrier must pay all costs, including those for counterclaims, subject to its right to seek reimbursement of costs attributable solely to the counterclaims. In most cases, however, the bulk of discovery and pretrial preparation for the counterclaims will overlap with the work to defend the plaintiff's claims. In many cases, as in the hypothetical, the counterclaims are also asserted as affirmative defenses. At best, only some work to research discrete legal issues or analyze damages on the counterclaims could potentially be allocable under the *Buss* standard.

Think twice before you accept a carrier's refusal to pay for counterclaims. If a reasonable defense attorney would conclude that the counterclaims are necessary to properly defend the case, then the reasonable costs of the counterclaims may be recoverable. At minimum, the burden should be on the carrier to pay subject to its right to try to allocate at the end of the case. The carrier should not be allowed to prejudice the defense of the insured by refusing to fund necessary counterclaims.

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grant limited use immunity for the "act of production" of documents. Or, in some cases, the courtesy of a grand jury subpoena is abandoned in favor of document retrieval effected through execution of a search warrant, making Fifth Amendment concerns irrelevant.

Often it is unclear whether documents, such as office calendars or phone records, are "personal" or "corporate" records. See, e.g., *In Re Grand Jury Subpoenas Dated October 22, 1991, and November 1, 1991*, 959 F.2d 1158, 1164 (2nd Cir. 1992) (corporate president's phone records for his private office line are corporate, not personal, records). Courts apply a "functionality test" to determine whether records are "personal" or "corporate." See *In Re Sealed Case (Government Records)*, 950 F.2d 736, 740-41 (D.C. Cir. 1991) (discussing cases); *United States v. Wujkowski*, 929 F.2d 981, 984 (4th Cir. 1991) (remanding to district court for particularized inquiry into whether entries in appointment books were personal or business records); *In Re Grand Jury Subpoena dated April 23, 1981*, 657 F.2d 5, 8 (2nd Cir. 1981) (creating six point functionality test); *McBryar v. International Union of United Auto. Aerospace & Agricultural Workers*, 160 F.R.D. 691 (S.D. Ind. 1993) (applying multi-part functionality test); *In Re Grand Jury Subpoena Duces Tecum Dated Jan. 30, 1992*, 804 F. Supp. 582, 584 (S.D.N.Y. 1992) (denying permission to redact personal entries from corporate records).

The Privilege As Applied To Corporations. Corporate clients present a different challenge. Corporations do not have a Fifth Amendment privilege. *Braswell v. United States*, 487 U.S. 99, 102 (1988). Thus, the privilege may not be invoked to protect a corporation from compulsory disclosure of corporate records, even if those records incriminate the corporation or its employees. *George Campbell Painting Corp. v. Reid*, 392 U.S. 286, 289 (1968). In response to a subpoena directed to a corporation, an officer of a corporation must produce records of the company kept in the officer's representative capacity, even though the records might also personally incriminate the officer, because the act of production is considered to be the act of the corporation, not the individual. *Braswell v. United States*, *supra*, 487 U.S. at 109-110. This rule also applies to former employees who are custodians of records. *Matter of Grand Jury Subpoenas*, 959 F.2d 1158, 1163-64 (2nd Cir. 1992); *In Re Grand Jury Subpoena, dated Nov. 12, 1991*, 957 F.2d 807, 811-12 (11th Cir. 1992).

The corporate officer or employee's own personal privilege against self-incrimination does remain intact, and it is a violation of that privilege to compel the officer to give testimony about the corporate records he is producing if such testimony might incriminate the officer. *Curcio v. United States*, 354 U.S. 118, 124 (1957); *United States v. O'Henry's Film Works, Inc.*, 598 F.2d 313, 317-18 (2d Cir. 1979) (agent retains personal privilege against self-incrimination). A corporate representative may, however, be requested to give testimony "auxiliary to the production," e.g. to authenticate the

documents or to state the lack of possession of documents. *United States v. O'Henry's Film Works*, *supra*, 598 F.2d at 318; *In Re Custodian of Records of Variety Distributing, Inc.*, 927 F.2d 244, 250-51 (6th Cir. 1991) (records custodian may be compelled to make statements to authenticate records, because to do so "merely makes explicit what is implicit in the act of production and [subjects] the custodian...to little, if any, further danger of incrimination.").

Consequences of Asserting the Fifth Amendment Privilege in a Civil Case

Adverse Inferences. While adverse inferences may not be drawn against a criminal defendant who asserts his Fifth Amendment right not to testify, *Carter v. Kentucky*, 450 U.S. 288, 300 (1981), the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence against them. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976); see, e.g., *Securities and Exchange Commission v. Rehtorik*, 755 F. Supp. 1018, 1020 (S.D. Fla. 1990) (permitting adverse inferences to be drawn in SEC civil suit). Accordingly, the assertion of a Fifth Amendment privilege in a federal civil case may result in the drawing of an adverse inference by the trier of fact that the answers to the questions would have been adverse to the witness' interest. *National Acceptance Co. of America v. Bathalter*, 705 F.2d 924, 929-30 (7th Cir. 1983); *Brink's, Inc. v. City of New York*, 717 F.2d 700, 707-710 (2nd Cir. 1983). Compare Cal. Evid. Code § 913 (prohibiting the trier of fact from drawing "any inference...as to the credibility of the witness or as to any matter at issue in the proceeding if the witness exercises the privilege against self-incrimination"). Moreover, the invocation of the privilege by corporate employees may result in the drawing of an adverse inference against the corporation. *Brink's, Inc. v. City of New York*, *supra*, 717 F.2d at 707; *Rad Services, Inc. v. Aetna Cas. and Sur. Co.*, 808 F.2d 271, 274 (3rd Cir. 1986) (former employee); *Cerro Gordo Charity v. Fireman's Fund American Life Ins. Co.*, 819 F.2d 1471, 1482 (8th Cir. 1987). But see *Veranda Beach Club Ltd. Partnership v. Western Sur. Co.*, 936 F.2d 1364, 1374 (1st Cir. 1991) (without more, individuals' invocation of personal privilege against self-incrimination cannot be held against his corporate employer).

An adverse inference may not, however, be the sole basis for a finding of liability; independent, corroborative evidence of wrongdoing must be shown. *United States v. Premises Located at Route 13*, 946 F.2d 749 (11th Cir. 1991); *National Acceptance Co. of America v. Bathalter*, 705 F.2d 924, 932 (7th Cir. 1983).

Evidentiary Sanctions. Invocation of the Fifth Amendment privilege in one proceeding may lead to exclusion as a trial witness in later proceedings, see *In Re Grand Jury Subpoena*, 836 F.2d 1468, 1477 (4th Cir.), *cert. denied*, 487 U.S. 1240 (1988), or the striking of prior testimony if the privilege is invoked after some testimony has been already given. *Lawson v. Murray*, 837 F.2d 653, 656 (4th Cir.), *cert. denied* 488 U.S. 831 (1988). Sanctions may be in the form of a

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BARRY P. GOODE

On ENVIRONMENTAL LAW

"Science is simply common sense at its best; that is, rigidly accurate in observation and merciless to fallacy in logic."

Thomas Henry Huxley, *The Crayfish* (1880)
quoted in Gould, *Full House* (1996)

Daubert and Joiner tell us, explicitly, the rules for the admissibility of expert testimony. They also tell us, implicitly, that environmental litigators must learn enough science to apply the law to a case at hand. (See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. et al. v. Joiner*, 118 S.Ct. 512 (1997).)

What should you do when you have to determine whether the opinion offered by your opponent's expert is relevant and reliable? Here—limited to 800 words—are a few hints.

You Can Understand the Science

Do not yield to the fear that scientific issues are beyond you. As Huxley said, science is rooted in common sense and logic—and you deal with them all the time. You just need to apply your usual, rigorous habits of mind to the task of ferreting out the underpinnings of the expert's opinion.

Use your experts to educate you: Use your expert well. Do not simply ask her to attend her counterpart's deposition or give you questions in advance. Neither is sufficient. You need an education; not companionship and hints. And you need that education before you attempt to depose the adverse expert.

Tell your expert you want a tutorial. Confess your ignorance. Find a room without telephones and revel in the opportunity to learn something new. Ask many questions. Do not leave a subject until you understand it.

At deposition, insist on understanding the basis for the witness' testimony: Do not simply accept an answer you do not understand. That does no good. To test whether an expert's opinion is relevant and reliable you must understand both the opinion and the basis for it.

Get all the articles on which the expert relies. Learn how and why he relies on them. (Are they peer-reviewed?) Obtain all his workpapers. If they contain mathematical equations, make sure you understand—in words—what the expert is trying to determine and how it relates to his opinion. You may not follow all the arithmetic, but insist on following the logic. (Pay close attention to the units he uses. Is the expert working with miles per hour? meters per second? feet per day?) Ask about error bands and confidence limits. How sure is he of his results?

Drive to the premises and assumptions: Few questions are as useful as "how do you know that?" "on what do you base that?" and "where does that number come from?" Do not conclude the deposition until you know what is measured, calculated, inferred and assumed.

Measurements: If the opinion is based on measurements, you must dig deeper. What was measured? How? Where is that recorded? What protocols are generally accepted for making that measurement? Were they followed? How does the expert know that? What quality assurance and quality control work was done? More often than not, the task of measuring natural phenomena is less tidy than an expert might have you believe. It profits you to delve.

Calculations: Ask for a disk containing any computer files the expert created. A spreadsheet contains the algorithms—the logic—used to make the calculations. If you neglected to ask something important at deposition, you may find it embedded in the spreadsheet. Likewise, you can double-check the expert's work and see what happens if you change key assumptions.

Assumptions and inferences: Determine where the expert has made an assumption, inferred something or relied on "professional judgment." Then probe. What is the basis for that? Does peer-reviewed literature support it? Is the premise generally accepted in the relevant scientific community? Is it in tension with other, scientifically valid notions? How sensitive is the conclusion to the assumption? Focus on the most sensitive parameters. They often provide the basis for a *Daubert* challenge.

Check what you have discovered: After the deposition, go back to your expert for help. Have her review the measurements, calculations, assumptions, inferences and logic. Ask her to read the literature on which the expert relied. Ask whether the deponent's opinion bespeaks science or something else. Ask what weaknesses exist. Ask whether there is a credible basis for asserting the opinion is not reliable.

Re-read Daubert and Joiner

Do you have a credible challenge under the new legal standards? Can you articulate it clearly? If so, have at it.

One more thing. Realize your adversary is (or should be) doing the same thing with respect to your case. Prepare your experts in a way that does not render them susceptible to a *Daubert* challenge.

If we all do that, then we will have begun to rise to *Daubert* and *Joiner's* challenge to permit only good science in our justice system.



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Parallel Proceedings

"preclusion order," preventing introduction by a party of any evidence as to matters upon which the party has asserted a Fifth Amendment privilege. See *S.E.C. v. Cymaticolor Corp.*, 106 F.R.D. 545, 549-50 (S.D.N.Y. 1985); *S.E.C. v. Grossman*, 121 F.R.D. 207, 210 (S.D.N.Y. 1987). While courts have upheld a variety of evidentiary sanctions for invocation of the privilege, courts have generally held that dismissal is too harsh. *Campbell v. Gerrans*, 592 F.2d 1054, 1058 (9th Cir. 1979); *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084, 1087-88 (5th Cir. 1979).

Public Perception. Perhaps the most profound consequence of assertion of the Fifth Amendment privilege is the public perception of it, or the fear of such public perception by your client. Although the law teaches us that the Fifth Amendment privilege "protects the innocent as well as the guilty," *Murphy v. Waterfront Com'n*, 378 U.S. 52, 55 (1964), the real world is less forgiving, and the business community in which your client operates may view the refusal to testify as a tacit admission of wrongdoing. A refusal to testify may also pique the interest of civil parties or administrative regulators.

Consequences of Not Asserting the Privilege

Given the potential for adverse inferences, the civil litigator's instinct will likely be to recommend that the client or witness not assert any Fifth Amendment privilege in the civil case. This course, however, is also fraught with problems.

Use Against the Client in Criminal Proceedings. The right not to provide evidence against oneself in a criminal case is absolute and valuable, and should not be lightly squandered. First and most obviously, the client's civil testimony (at a deposition or in interrogatory answers) may be used against the client in a subsequent criminal proceeding. *United States v. Kordel*, 397 U.S. 1 (1970), *cert. denied*, 400 U.S. 821 (1970); Fed. R. Evid. 801(d)(2). Also, providing testimony in the civil case may assist the criminal prosecutor's investigation by educating the prosecutor and revealing the client's defenses, information which would not otherwise be available to the prosecutor in criminal discovery. See Pollack, *Parallel Civil and Criminal Proceedings*, 129 F.R.D. 201, 207-209 (discussing differing discovery rules in civil and criminal proceedings in the context of parallel proceedings). A deposition transcript also "locks in" the client's testimony, and commits counsel to a theory of defense which in a later criminal proceeding may seem ill-advised. It also may be the source of impeachment material, or perhaps even a false statement charge, should a criminal prosecution against your client proceed. Bear in mind, too, that testimony given in a federal proceeding might be of interest to a state prosecutor, and vice versa.

Waiver Issues. Second, and more subtle, are waiver issues. Once a witness begins to give testimony on a subject, the door is open to further questioning on related issues. To allow otherwise, the Supreme Court has ruled, "would open the way to distortion of facts

by permitting the witness to select any stopping place in the testimony." *Rogers v. United States*, 340 U.S. 367, 371 (1951). Thus, a client cannot attend a deposition to give testimony "just on this one issue," and prevent inquiry into other related areas.

Similarly, failure to make a timely objection based on the Fifth Amendment privilege in response to a request for production of documents or interrogatories in civil discovery may constitute a waiver. *Brock v. Gerace*, 110 F.R.D. 58, 63-65 (D. N.J. 1986). Civil litigators should be vigilant to avoid waiver issues. The Fifth Amendment privilege may be pleaded in an answer. *National Acceptance Co. of America v. Bathalter*, 705 F.2d 924, 932 (7th Cir. 1983); *Arden Way Associates v. Boesky*, 660 F. Supp. 1494, 1499 (S.D.N.Y. 1987). The privilege may also be asserted in response to requests for production of documents. *de Antonio v. Solomon*, 42 F.R.D. 320, 322 (D. Mass 1967) or interrogatories, *Gordon v. Federal Deposit Ins. Co.*, 427 F.2d 578, 580 (D.C. Cir. 1970).

The effect of a waiver is limited to the particular proceeding in which the waiver occurs. Thus, if a witness waives his Fifth Amendment privilege and gives testimony in one proceeding, he will not be prevented from asserting the privilege in a later proceeding. *In Re Morganroth*, 718 F.2d 161, 165 (6th Cir. 1983); *United States v. Licavoli*, 604 F.2d 613, 623 (9th Cir. 1979), *cert. denied*, 446 U.S. 935 (1980); *contra, United States v. Miller*, 904 F.2d 65, 67 (D.C. Cir. 1990) (minority rule that testimony at one proceeding waives privilege and precludes assertion of privilege in subsequent proceedings). If a witness does assert his privilege at a later proceeding, he may be "deemed unavailable" as a witness in the later proceeding, such that the transcript of his prior testimony may be admissible against him. See Fed. R. of Evid. 804(a)(1) and (b)(1), *In Re Corrugated Container Antitrust Litigation*, 661 F.2d 1145, 1158 (7th Cir. 1981), *aff'd. on other grounds*, 459 U.S. 248 (1983).

Conversely, asserting the Fifth Amendment privilege at a deposition does not as a matter of law preclude a witness from testifying at a later proceeding. However, a civil judge may bar such testimony if no opportunity for pretrial discovery is made available.

Possible Solutions to Fifth Amendment Problems

The existence of parallel civil and criminal proceedings presents the civil defendant with the Hobson's choice between suffering the embarrassment and adverse consequences of invoking his Fifth Amendment rights, or testifying and giving the prosecutor a windfall benefit either by incriminating himself or by revealing his defenses in a manner which would not otherwise be required under the more narrow rules applicable to criminal discovery. To address these and other inequities, courts are sometimes willing to fashion creative remedies.

Stays Of Civil Actions. Perhaps the cleanest way to resolve the parallel proceeding dilemma is to obtain a stay of civil proceedings pending the outcome of the criminal case. While there is no constitutional right to

CHARLES R. RICE

On SECURITIES

Securities litigators can expect a new phase of the "reform wars" before the end of 1998. The Private Securities Litigation Reform Act ("Reform Act"), passed in December 1995, sought to curb abusive class actions by raising the pleadings standards for federal class actions and prohibiting discovery until these standards are met. Plaintiff firms have responded in many cases by doubling their complaints, filing parallel class actions in state court under state law, especially in California. Congress now appears close to putting an end to this state court strategy.

The Uniform Standards Act

The Securities Litigation Uniform Standards Act (S.1260; H.R. 1689) (the "Uniform Standards Act") will preempt the state court strategy for "covered securities" by providing that (1) no class action may assert securities fraud claims based on state law; and (2) any securities fraud class action brought in state court may be removed to federal court. Put simply, for class claims relating to securities traded on national exchanges, there will be no more state law or, in most cases, state courts.

The Act responds to concerns that class plaintiffs' state court strategy has stymied the Reform Act goals of (1) encouraging companies to make good faith, forward-looking statements by creating a federal statutory safe harbor; and (2) preventing ruinous discovery costs from forcing settlements of weak, "fraud-by-hindsight" cases. The Act's advocates claim that, without preemption, the fear of state law claims will continue to chill forward-looking statements and that state court actions will continue to drive up litigation costs and settlement amounts.

Somewhat surprisingly, the SEC has found that both the actual number of state securities class actions and the percentage of all securities class actions that were filed in state court declined significantly from 1996 to 1997. These national statistics, however, do not accurately reflect what has happened in California. Here, parallel state cases are the rule, not the exception, because plaintiffs' counsel in the state believe they can bring nation-wide class claims for "fraud on the market" based on California's Corporation Code. (The liability and breadth of these claims has yet to be decided by the California Supreme Court.)

The Senate Amendments

Initially, the SEC discouraged Congress from further before the Reform Act's impact could be fully assessed, but now it has thrown its support behind the Uniform Standards Act. President Clinton, who vetoed the Reform Act, also backs the new legislation. The support of the SEC and White House, however, has come

at the price of several changes to the original bill.

The bill passed by the Senate by a 79-21 margin has a "Delaware carve-out" to ensure that certain corporate governance claims will continue to be determined by state law. Class actions based on the law of the issuer's state of incorporation will be permitted, in either state or federal court, for misrepresentations in certain types of transactions or communications between the issuer and its shareholders (such as tender offers).

Most significantly, the Senate sponsors agreed to the SEC's request to add "legislative history" to clarify that the Reform Act was not intended to eliminate fraud liability for recklessness. The SEC requested this "clarification" because several federal district courts have found, despite SEC *amici* brief to the contrary, that something more than "mere" recklessness is now required for fraud. See e.g., *In Re Silicon Graphics, Inc. Litig.*, 970 F. Supp. 746 (N.D. Cal. 1997) (plaintiffs "must create a strong inference of knowing or intentional misconduct," which "includes deliberate recklessness").

What Happens Next?

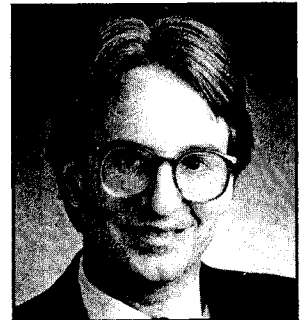
As we go to press, the House version of the Uniform Standards Act is still in committee. But the odds are that some version of the Act, probably close to the amended bill passed by the Senate, will soon be law.

Unfortunately, companies that already face parallel state and federal proceedings will probably get little or no relief from the Act if, as expected, it applies only prospectively. Since these defendants will have to proceed

in both forums, the California courts will still be pressed to resolve many open issues under the California securities laws — ironically, just as these state law issues become moot for almost all new class actions.

Despite these reforms, no one should underestimate the resilience and creativity of the securities plaintiffs' bar. Some enterprising attorneys will not doubt try to take advantage of the exception, recently added to the Senate bill, for class actions by state or local governments or their pension funds. Creative attorneys will also try to avoid the Act's definition of "class-action," which (in the Senate bill) includes any "group of lawsuits" based on the same securities claims that are joined or consolidated and seek damages for more than 50 persons.

Finally, one unintended consequence of the latest legislative reform may be a blessing for securities plaintiffs. At least in California, defendants have had some success in arguing that "mere" recklessness should not be sufficient for federal securities fraud. If the revised legislative history for the Uniform Standards Act effectively lowers the *scienter* required for federal liability, some defendants may come to regret this reform.



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Parallel Proceedings

such a stay of civil proceedings, *Federal Sav. and Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 902 (9th Cir. 1989); *Securities and Exchange Commission v. Dresser Industries, Inc.*, 628 F.2d 1368 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980), a court may, in its discretion, stay civil proceedings pending the outcome of parallel criminal proceedings "when the interests of justice seem [] to require such action." *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1202 (Fed. Cir. 1987) (order denying motion to stay civil proceedings vacated). See *United States v. Kordel*, 397 U.S. 1, 9 (1970) (holding it appropriate to postpone civil discovery under F.R.C.P. 30(b) until termination of the criminal action); *Peden v. United States*, 512 F.2d 1099, 1103 (Ct.Cl. 1975) ("[I]t has long been the practice to 'freeze' civil proceeding when a criminal prosecution involving the same facts is warming up or under way"); *Brock v. Tolkow*, 109 F.R.D. 116, 120 (E.D.N.Y. 1985) (staying all discovery in civil case pending outcome of possible criminal actions); *Gellis v. Casey*, 338 F. Supp. 651 (S.D.N.Y. 1972) (staying SEC administrative action pending criminal investigation). Compare, *Securities and Exchange Commission v. Rehtorik*, 755 F. Supp. 1018, 1019-20 (S.D. Fla. 1990) (granting stay of SEC accounting procedure but permitting SEC civil fraud suit to go forward despite parties' Fifth Amendment concerns).

Not all courts are willing to grant stays, and the trend in recent years has been to deny stays. See *Keating v. Office of Thrift Supervision*, 45 F.3d 322 (9th Cir.), cert. denied, 516 U.S. 827 (1995); *Federal Sav. and Loan Ins. Corp. v. Molinaro*, 889 F.2d 899 (9th Cir. 1989); *Southwest Marine, Inc. v. Triple A Mach. Shop, Inc.*, 720 F. Supp. 805 (N.D. Cal. 1989).

One might draw a distinction between staying a civil action in its entirety, and just staying civil discovery. See, e.g., *Brock v. Tolkow*, 109 F.R.D. 116, 119-120, 129 (E.D.N.Y. 1985) (noting that the request at issue is only to stay discovery; "in all other aspects the civil case will go forward."). However, most opinions on this subject seem to treat a stay of civil proceedings and a stay of civil discovery as the same thing. See, e.g., *In Re Par Pharmaceutical, Inc. Securities Litigation*, 133 F.R.D. 12, 13 (S.D.N.Y. 1990) (referring alternatively to a "stay [of the] civil proceeding" and a "stay of discovery."). Indeed, one can imagine little left to accomplish in a civil action if all discovery is halted.

In considering a stay application, courts look at the particular circumstances and the competing interests involved in the case. The Ninth Circuit has set forth a five point test for determining the propriety of granting a stay, which includes consideration of (1) the plaintiff's interest in the expeditious resolution of the civil case; (2) the burden on the defendants; (3) the convenience of the courts; (4) the interest of third parties; and (5) the interests of the public. *FSLIC v. Molinaro*, 889 F.2d 899, 903 (9th Cir. 1989). The *Molinaro* court denied the stay of civil proceedings, in large part because no criminal indictments had yet been returned. *Id.* at 903.

Some arguments which may be raised in support of a stay application include:

- The civil proceedings are simply unfair when they intrude upon the Fifth Amendment privilege. See, e.g., *Brock v. Tolkow*, 109 F.R.D. 116, 120 (E.D.N.Y. 1992); *Dienstag v. Bronsen*, 49 F.R.D. 327, 329 (S.D.N.Y. 1970). But see *United States v. Private Sanitation Industry Ass'n of Nassau/ Suffolk, Inc.*, 811 F. Supp. 802, 806-08 (E.D.N.Y. 1992) (declining to follow *Brock*).
- The broader scope of civil discovery will provide the criminal prosecutor with a windfall of information not otherwise available under closely prescribed criminal discovery rules. *Afro-Lecon v. United States*, 820 F.2d 1198, 1203 (Fed. Cir. 1987); *Digital Equipment Corp. v. Currie Enterprises*, 142 F.R.D. 8, 13 (D. Mass. 1991) (collecting cases but denying stay).
- For a corporation whose employees are under criminal investigation, it is unfair to penalize the corporation in the civil case because its employees, whom it cannot control, assert Fifth Amendment rights, especially if a stay will potentially permit them to testify later in the civil action once criminal issues are resolved. See *Afro-Lecon v. United States*, *supra*, 820 F.2d at 1206-07.
- Assuming a quick resolution of the criminal case, a stay will not unduly prejudice the civil plaintiffs. See, e.g., *Golden Quality Ice Cream Co., Inc. v. Deerfield Specialty Papers, Inc.*, 87 F.R.D. 53, 56 (E.D. Pa. 1980).
- Judicial economy and efficiency may be promoted by resolution of the criminal case before the civil case, due to *res judicata* determinations or elimination of discovery battles. *White v. Mapco Gas Products*, 116 F.R.D. 498, 502 (E.D. Ark. 1987); *Golden Quality Ice Cream v. Deerfield*, 87 F.R.D. 53, 57-58 (E.D. Pa. 1980); *United States v. Mellon Bank*, 545 F.2d 869, 873 (3rd Cir. 1976).

A stay is much more likely to be granted where criminal charges are actually pending. *FSLIC v. Molinaro*, *supra*, 889 F.2d at 903; *Securities and Exchange Commission v. Dresser Industries, Inc.*, 628 F.2d 1368, 1375-76 (D.C. Cir.), cert. denied, 449 U.S. 933 (1980). But see *Keating*, 45 F.3d at 324-26 (upholding refusal to stay proceeding resulting in \$36 million restitution order against Charles Keating notwithstanding that Keating was under federal indictment while the civil proceeding took place). If a criminal case is not yet pending, a stay will likely be denied. See, e.g., *United States v. Private Sanitation Industry Ass'n.*, 811 F. Supp. 802, 805 (E.D.N.Y. 1992) (noting that the lack of a pending indictment was alone grounds for denying the stay); *United States v. District Council of New York City*, 782 F. Supp. 920, 925 (S.D.N.Y. 1992) (denial of stay when no indictment pending). Similarly, if a guilty plea has already been entered or criminal trial completed, an argument for a stay is less persuasive. *Arden Way v. Boesky*, 660 F. Supp. 1494, 1499 (S.D.N.Y. 1987). But see *Twenty First Century Corp. v. LaBianca*, 801 F. Supp. 1007, 1011 (E.D.N.Y. 1992) (granting stay when defendant has pled guilty but is

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awaiting sentence).

Note that the government may seek a stay of civil proceedings pending resolution of a criminal case, or may resist discovery efforts in civil actions, in order to prevent the defendant's circumvention of criminal discovery rules. The government has generally fared well in its efforts to control the timing of discovery. See, e.g., *United States v. Stewart*, 872 F.2d 957, 962-03 (10th Cir. 1989) (granting government protective order to prevent defendant from deposing or otherwise "harassing" government witnesses); *In Re Ivan F. Boesky Securities Litigation*, 128 F.R.D. 47 (S.D.N.Y. 1989); *Campbell v. Eastland*, 307 F.2d 478 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963).

Stays Of Particular Discovery. A less dramatic (and more likely successful) option available to a civil litigant when there are parallel proceedings is to try to stop or limit specific discovery in the civil case. For example, counsel might ask the court to stay the depositions of particular individuals only or to stay all discovery for only a set period of time. Given the lesser burden such limited requests place on the parties seeking discovery, such requests are much more likely to be granted. See, e.g., *S.E.C. v. Power Securities Corp.*, 142 F.R.D. 321, 323 (D. Colo. 1992) (granting request for protective order to postpone one deposition for three months).

Protective Orders. It is also possible to request a protective order for a particular witness, or for particular subject areas of discovery, pursuant to Fed. R. Civ. Proc. 26(c). A protective order pursuant to Fed. R. Civ. Proc. 26(c) may be sought, or stipulated to, in an effort to provide a confidentiality shield through sealing of records, in order to keep the fruits of the discovery from being shared with governmental authorities. A growing majority of courts, however, has adopted a *per se* rule that a grand jury subpoena overcomes a civil protective order so that documents responsive to the subpoena must be produced notwithstanding the protective order. See *United States v. Janet Greeson's A Place For Us, Inc.*, 62 F.3d 1222, 1226-27 (9th Cir. 1995); *In Re Grand Jury Proceedings (Williams)*, 995 F.2d 1013, 1015-20 (11th Cir. 1993); *In Re Grand Jury Subpoena*, 836 F.2d 1468, 1474-78 (4th Cir.), *cert. denied*, 487 U.S. 1240 (1988) (all three holding that a civil protective order cannot be used to shield civil discovery documents from grand jury subpoena).

The opposing view is that a civil protective order will protect documents from a grand jury subpoena unless the government can show either "improvidence in the grant of a Rule 26(c) protective order or some extraordinary circumstance or compelling need." *Martindell v. International Tel. and Tel. Corp.*, 594 F.2d 291, 296 (2nd Cir. 1979). The Second Circuit has indicated that it will adhere to *Martindell* even after the Fourth Circuit's adoption of the contrary, *per se* rule,

see *In Re Grand Jury Subpoena Duces Tecum Dated Apr. 19, 1991*, 945 F.2d 1221 (2d Cir. 1991), and some district courts remain willing to uphold protective orders in the face of grand jury subpoenas. See, e.g., *Digital Equipment Corp. v. Currie Enterprises*, 142 F.R.D. 8, 13-15 (D. Mass 1991) (holding that "this court can seal answers to interrogatories and limit disclosures to counsel," denying a stay and instead ordering the parties to stipulate to a protective order).

The First Circuit has recently rejected both approaches, adopting a balancing test, albeit one in which the scales are weighted in favor of the grand jury subpoena and against the protective order. See *In Re Grand Jury Subpoena*, 138 F.3d 442 (1st Cir. 1998).

In light of the emerging trend, however, it seems safest to assume that a Rule 26(c) protective order, no matter how broad, will not guarantee that evidence from civil discovery will not "somehow find its way into the government's hands for use in a...criminal prosecution." *United States v. A Certain Parcel of Land Moultonboro*, 781 F. Supp. 830, 834 (D. N.H. 1992) (citing *Andover Data Services v. Statistical Tabulating Corp.*, 876 F.2d 1080, 1083 (2nd Cir. 1989)).

The very act of seeking a stay or protective order in a civil case, however, may have collateral benefit in the criminal case. One court has observed that by seeking a civil protective order, "[the defendants] have adequately preserved their right to object to a subsequent criminal conviction based on their own incriminating statements made during civil discovery." *Mid-America's Process Service v. Ellison*, 767 F.2d 684, 686 (10th Cir. 1985).

Civil Immunity. California has a unique procedure for a private litigant to seek use immunity for a witness in a civil deposition. Under the authority of *Daly v. Superior Court*, 19 Cal. 3d 132 (1977), a civil litigant may move to compel answers under a protective order granting a witness use immunity. Notice is given to the District Attorney for the district in which the action is pending, the California Attorney General, and the United States Attorney for the district in which the county is located. If no prosecutor objects, the court may compel testimony under immunity. Obviously, this procedure will only be of value to the client who is not the target of a criminal investigation.

No comparable procedure is available in federal court, where only the Department of Justice may seek a testimony compulsion order (with attendant immunity) under 18 U.S.C. §§ 6001 *et seq.* *United States v. Alessio*, 528 F.2d 1079, 1081-82 (9th Cir.), *cert. denied*, 426 U.S. 948 (1976). However, a similar result might be achieved in certain cases through negotiations with federal prosecutors for "letter immunity" or a "witness assurance letter." See, e.g., *United States v. Levasseur*, 846 F.2d 786, 795, 798 (1st Cir.), *cert. denied*, 488 U.S. 894 (1988) (upholding use of letter immunity); but see *United States v. Biaggi*, 675

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F.Supp. 790, 804 (S.D.N.Y. 1987) (frowning on use of informal or letter immunity and refusing to recognize in federal court an immunity letter provided by a state prosecutor).

If Everything Fails. Assuming your attempts to seek a complete stay, a partial stay, a protective order and immunity have all failed, your client will be faced with the Hobson's choice of testifying and potentially incriminating himself, or invoking his privilege and suffering the civil consequences. Different counsel representing your client or representing related parties will argue different strategies: civil counsel will favor testimony and criminal counsel will favor silence; corporate counsel will usually want their employees' testimony while the employees' individual counsel may hesitate. The final decision will be made on a case-by-case basis, depending on such factors as the likelihood of criminal prosecution, the content of the testimony, the rank or level of involvement of the witness (and, therefore, the degree of potential damage from adverse inferences), the financial or other personal interest of the witness in the outcome of the civil case, the availability of other witnesses in the civil case to supply otherwise "missing" testimony, the timing of the two proceedings, the likelihood of settling either proceeding, and other factors unique to the particular case.

Res Judicata and Collateral Estoppel

A felony criminal conviction may be used offensively as evidence in a subsequent civil action. Fed. R. Evid. 803(22). If issues are adjudicated adversely to a party in a criminal action, that party may be collaterally estopped from relitigating those issues in a subsequent civil suit. *See, e.g., United States v. Killough*, 848 F.2d 1523, 1528 (11th Cir. 1988); *United States v. Uzzell*, 648 F. Supp. 1362 (D. D.C. 1986) (criminal conviction as collateral estoppel on underlying facts of conviction). Indeed, a court may more readily apply the doctrine of collateral estoppel in a subsequent civil case because of the rigorous protections against unjust conviction in criminal cases, including the requirements of proof beyond a reasonable doubt and a unanimous verdict. The converse, however, is not true: a judgment unfavorable to a party in a civil or administrative context will not be *res judicata* in a subsequent criminal case. *United States v. General Dynamics Corp.*, 828 F.2d 1356, 1361 n.5 (9th Cir. 1987); *Cf., Fed. R. Evid. 408* (civil settlement is not an admission of liability).

A plea of guilty in a criminal case represents not just a criminal conviction, but further is provable as an admission (or a declaration against interest) in a subsequent civil proceeding involving the same act or omission. Fed. R. Evid. 801(d)(2), 804(b)(3). A plea may be an admission in situations where a conviction would not, *e.g., for a misdemeanor. See Hancock v. Dodson*, 958 F.2d 1367, 1371 (6th Cir. 1992).

A plea of *nolo contendere* has different consequences. It may *not* be used as an admission in a civil suit based upon the same conduct giving rise to the criminal prosecution. Fed. R. Evid. 410(2); Fed. R. Crim. Pro. 11(c)(6)(B); *Doherty v. American Motors Corp.*, 728 F.2d 334, 337 (6th Cir. 1984). However, a *nolo* plea may still serve as a "conviction" for administrative purposes. *See, e.g., Pearce v. U.S. Dept. of Justice*, 836 F.2d 1028, 1029 (6th Cir. 1988) (physician's *nolo contendere* plea could be considered in administrative license revocation proceedings); *see also Myers v. Secretary of Health and Human Services*, 893 F.2d 840, 843-44 (6th Cir. 1990) (*nolo contendere* plea admissible in administrative proceedings).

Note that an *acquittal* in a criminal case is not admissible "to prove innocence" in a subsequent civil case. *See United States v. Irvin*, 787 F.2d 1506, 1516-17 (11th Cir. 1986).

(Editor's Note: This article will conclude in our next issue with a discussion of settlement considerations, the joint defense privilege and sentencing.)

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