

Expert Analysis

When Civil Litigants Face Criminal Proceedings

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The existence of a criminal investigation arising out of the same set of facts as a civil case presents both opportunities and challenges for attorneys representing the civil litigants. A civil defendant implicated in the criminal investigation will face the difficult choice of either defending the civil case on the merits and waiving the Fifth Amendment right against self-incrimination, or invoking and standing behind the privilege, at the cost of hobbling the defense of the civil case.

While one can move to seek a stay of the civil case, courts are generally reluctant to grant a stay unless an indictment has already been returned, even in circumstances when the defendant is a target of investigation. In the end, the prudent strategy is often to invoke the Fifth Amendment in the civil case, but aggressively pursue civil discovery in order to gather facts that can be used in defense of the criminal investigation.

Conversely, the plaintiff in a civil case against defendants under criminal investigation will typically have the upper hand in the civil proceeding, especially if the defendant is invoking the Fifth Amendment. Potential tools to further hamstring the civil defense include a motion to strike the affirmative defenses pled in the answer, as well as motions in limine to preclude the defendant from presenting at trial any evidence previously withheld on privilege grounds.

However, the existence of a parallel criminal investigation can also make prosecution of the civil case more protracted, expensive and difficult to prove, especially if the court grants a stay, or if third-party witnesses who are also potential subjects or targets of the criminal investigation refuse to testify. Finally, if the plaintiff also becomes implicated in the investigation, and decides to invoke the Fifth, the civil case is likely to be dismissed by the court, because the law does not allow those who invoke the privilege to use it simultaneously as both shield and sword.

Considerations for Civil Defendants

Seeking a Stay of the Civil Action



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One of the first tactical decisions for a client who is both a defendant in a civil case and implicated in a parallel criminal investigation is whether to seek a stay of the civil case. The law allows defendants in such circumstances to seek a stay of the civil proceedings, in order to avoid having to make the Hobson's choice between testifying in one's own civil defense and invoking the Fifth Amendment privilege.

This being the case, a defendant who wants to seek a stay should do so as soon as practicable, before having to respond to any discovery in the civil case. Once the defendant has invoked the privilege to resist the disclosure of information in discovery, the Hobson's choice has been made, and the defendant is prohibited from using that same evidence later in the civil trial.[1] Courts would view a motion to stay made after this point as having little merit.

Both federal and California state courts have discretion to issue a stay of civil cases where defendants are also implicated in parallel criminal proceedings. In California, the request of stay is often referred to as a Pacers motion, based on *Pacers Inc. v. Superior Court*.^[2] The factors analyzed by federal and state courts are similar: (1) the extent to which the defendant's Fifth Amendment rights are implicated; (2) the burden which any particular aspect of the proceedings may impose on the defendant; (3) the interest of the plaintiff in proceeding expeditiously with this litigation and the potential prejudice to plaintiffs of a delay; (4) the convenience of the court in the management of its cases and the efficient use of judicial resources; (5) the interests of persons not parties to the civil litigation; and (6) the interest of the public in the pending civil and criminal litigation.^[3]

In practice, the most decisive factor in the court's stay analysis will generally be whether an indictment has already been returned against the defendant. Courts have recognized that there is a strong case in favor of a stay after a grand jury returns a criminal indictment, and where there is a large degree of overlap between the facts involved in both cases. By contrast, courts are often reluctant to stay the civil case where the defendant is simply the "target" or "focus" of an investigation, with no reliable way to ascertain when, if ever, an indictment will be returned. In practice, stay orders are difficult to obtain because civil defendants are frequently required to make the decision about whether or not to invoke the Fifth Amendment well before an indictment is formally returned. Because the stakes involved in a criminal proceeding are usually much higher, the cloud of a potential future indictment is often enough to make the defendant decide to invoke the Fifth Amendment, even at the cost of financial exposure in the civil case.

Implications of Invoking the Fifth Amendment

If the court declines to stay the civil case, a defendant's decision to invoke the Fifth Amendment may introduce additional complications in the civil case. First, while California law does not permit the trier of fact in civil actions to draw adverse inferences from an invocation of the Fifth Amendment (see Cal. Evid. Code Section 913), federal law permits such adverse inferences in civil actions.^[4] However, before an adverse inference can be drawn in a federal civil case, the party requesting the adverse inference must first prove that (1) there is a substantial need for the information and there is no other less burdensome way of obtaining the information, and (2) it suffered actual prejudice to the extent that would justify infringement of the defendant's constitutional right.^[5] A defendant facing an adverse inference request should therefore emphasize the ways in which the plaintiff had other ways

of obtaining the information and/or could adequately prepare their case without the information.

Second, although invoking the Fifth Amendment may severely hamstring a defendant's ability to defend the civil case, there are still ways to use the civil case to the defendant's advantage. For example, where the plaintiff in the civil case is working together or sharing information with the government agency pursuing the criminal investigation, the defendant may be able to use the civil case as a vehicle to obtain early discovery from the government, e.g., by requesting relevant documents, deposing potential government witnesses or examining them at trial. The defendant can then use that information to formulate the best defense strategy for the criminal proceeding. This approach is particularly applicable in civil actions brought by public enforcement agencies, like the SEC, that regulate conduct that could also give rise to a parallel criminal investigation.

Invoking Other Privileges in Conjunction With the Fifth Amendment

In some circumstances, a defendant who is invoking the Fifth Amendment may also be able to prevent a co-defendant in the civil case from disclosing information by invoking other privileges in conjunction with the Fifth Amendment, such as the attorney-client privilege or the marital communications privilege. For example, if a husband and wife are co-defendants in the civil case, but only the husband is implicated in the criminal investigation, the husband may prevent the wife from testifying in the civil action by invoking both the Fifth Amendment and the marital communications privileges. In this situation, the co-defendant who is thus prevented from defending herself due to another's assertion of privilege can bring a motion to dismiss the civil case pursuant to *Solin v. O'Melveny & Myers*,^[6] arguing that her due process rights would be violated by her inability to disclose information material to her defense.

The co-defendant bringing a *Solin* motion would have to prove (1) that the evidence at issue is confidential and subject to a claim of privilege; (2) that the evidence is highly material to that party's defense; (3) that the court cannot use ad hoc equitable measures, such as sealing and protective orders, to permit the action to proceed; and (4) that it would be "fundamentally unfair" to allow the action to proceed.^[7] Although dismissal is a drastic remedy that courts grant only in rare cases, *Solin* motions are at least a potential alternative for defendants who are not invoking the Fifth Amendment themselves, but are prevented from fully defending themselves due to another defendant's invocation.

Considerations for Civil Plaintiffs

Motion to Strike Affirmative Defenses and Cross-Complaint

A plaintiff prosecuting a civil action against a defendant implicated in criminal proceedings will generally have a number of tactical advantages in the civil case, particularly where the plaintiff has successfully opposed a motion to stay and discovery in the civil case is moving forward. Where the defendant has decided to invoke the Fifth, one additional litigation tool available to the plaintiff is a motion to strike affirmative defenses. If a defendant who has pled affirmative defenses in his answer invokes the Fifth and refuses to respond to discovery concerning those affirmative defenses, those defenses are subject to being stricken.^[8] The same applies to any cross-complaint filed by a defendant invoking the Fifth.

The Fremont and Dwyer line of cases stand for the principle that a party cannot “have his cake and eat it too” — i.e., make affirmative pleadings and then invoke the Fifth as to information relevant to those pleadings. The cases hold that where the party making affirmative pleadings refuses to comply with court orders to respond to discovery regarding the subject matter of those pleadings, “ultimate sanctions” such as dismissal or striking of pleadings are appropriate. Because affirmative defenses are affirmative pleadings, the defendant must either forgo the Fifth Amendment privilege on the subject matter of those defenses, or abandon them.

Motion in Limine to Exclude Previously Withheld Evidence

If a defendant has invoked the Fifth Amendment to withhold evidence at any point during the discovery process, the plaintiff should also consider moving to preclude any testimony on the same subject matter at trial. Both federal and California law are in accord that it would be unfair to permit a litigant claiming privilege during discovery to waive that privilege and testify at trial.[9] However, in federal court, the court has discretion to decide whether or not to completely ban previously undisclosed evidence at trial, and some courts have required a showing that plaintiff was in fact unfairly surprised and prejudiced by the withholding of evidence in discovery.[10]

Plaintiff Implicated in a Criminal Investigation

Finally, where a plaintiff in a civil action was involved in business dealings with the defendant, it is not uncommon for the plaintiff himself to become implicated in a criminal investigation involving those business dealings. In such circumstances, the plaintiff will find it difficult to keep his own civil case from being dismissed if he invokes the Fifth Amendment and refuses to respond to discovery. In contrast with a Pacers motion, pursuant to which the court may grant a stay to protect a defendant who is involuntarily in court invoking the Fifth, courts generally will not grant stay for a plaintiff invoking the Fifth, because a plaintiff “cannot bring an action and then place it in limbo until it is safe for him to pursue it, requiring the adverse parties to accommodate his convenience while memories fade, witnesses disappear, and the pending litigation frustrates the futures of the defendants.”[11] Thus, the plaintiff who decides to invoke the Fifth should consider preemptively dismissing the civil case without prejudice, before the defendant has a chance to move for terminating sanctions and the court dismisses the case with prejudice.

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[1] See *A&M Records Inc. v. Heilman*, 75 Cal. App. 3d 554, 566 (1977).

[2] *Pacers Inc. v. Superior Court*, 162 Cal. App. 3d 686 (1984).

[3] See, e.g., *Federal Sav. And Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 902-03 (9th Cir. 1989); *Avant! Corp. v. Superior Court*, 79 Cal. App. 4th 876, 885 (2000).

[4] See, e.g., *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976); *SEC v. Colello*, 139 F.3d 674, 677 (9th Cir. 1998) (“Parties are free to invoke the Fifth Amendment in civil cases, but the court is equally free to draw adverse inferences from their failure of proof”).

[5] See, e.g., *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1265 (9th Cir. 2000); *SEC v. Graystone Nash Inc.*, 25 F.3d 187, 192 (3d Cir. 1994).

[6] *Solin v. O’Melveny & Myers LLP*, 89 Cal. App. 4th 451 (2001).

[7] *Dietz v. Meisenheimer & Herron*, 177 Cal. App. 4th 771, 792-94 (2009).

[8] See *Fremont Indemnity Co. v. Superior Court*, 137 Cal. App. 3d 554 (1982); *Dwyer v. Crocker Nat’l Bank*, 194 Cal. App. 3d 1418 (1987); *Hardbrodt v. Burke*, 42 Cal. App. 4th 168 (1996).

[9] *A&M Records Inc. v. Heilman*, 75 Cal. App. 3d 554 (1977); *Columbia Pictures Television Inc. v. Krypton Broadcasting of Birmingham Inc.*, 259 F.3d 1186, 1196 (9th Cir. 2001).

[10] See, e.g., *Graystone Nash*, supra, 25 F.3d at 193-94 (holding that the defendants’ invocation to prevent discovery by the SEC did not necessarily warrant complete proscription against evidence at trial absent showing that the SEC was in fact prejudiced).

[11] *Hartbrodt*, supra, 42 Cal. App. 4th at 174.