

# Daily Journal

JULY 23, 2014

- White Collar -

## Advantages of parallel investigations

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It has become common for the U.S. Department of Justice and the Securities and Exchange Commission to jointly investigate alleged securities offenses, and to initiate parallel criminal and civil proceedings. Press releases announcing the commencement of both actions are designed for maximum impact, and the prospect of facing parallel proceedings can be daunting.

While defending parallel actions simultaneously is not for the faint of heart, it can bring significant procedural advantages. Discovery tools that are only available in the civil case may reveal powerful evidence for the defense of the criminal trial. In addition, courts are increasingly requiring prosecutors to search not only their own files, but also those of the cooperating civil agencies for exculpatory and impeachment evidence that must then be disclosed to the defendant.

There will, of course, be times when it makes sense for the defendant to agree to a stay of the civil case while the criminal trial is pending. Counsel will have to weigh several factors, including the availability of insurance and other resources; the relative speed with which both cases will progress; and the risk that invocation of the Fifth Amendment privilege to protect the defendant in the criminal case could result in an adverse inference at the civil trial. In some cases, however, it will be advantageous to confront both proceedings at once.

### The Availability of Civil Discovery

Historically, when the DOJ and SEC jointly investigated and charged a defendant with securities violations, the government's playbook often called for the DOJ to intervene in the civil action to seek a stay of discovery, and for the SEC to acquiesce in the proposed stay. The prosecutors would typically claim that the defendant should not obtain the "special advantage" of civil discovery that would not normally be available in a criminal proceeding. *E.g.*, *SEC v. Saad*, 229 F.R.D. 90, 92 (S.D.N.Y. 2005).

While the issuance of a stay of the civil case is within the discretion of the court, an increasing number of courts now refuse to issue a stay where the only claimed prejudice to the government is that the defendant will have access to the tools of civil discovery, finding it unfair "that the U.S. Attorney's Office, having closely coordinated with the SEC in bringing simultaneous civil and criminal actions against some hapless defendant, should then wish

to be relieved of the consequences that will flow if the two actions proceed simultaneously." *Id.* at 91; *see also SEC v. Fraser*, CV-09-00443 (D. Ariz. June 1, 2009) (collecting cases). At the same time, the court may be responsive to a particularized claim by the defendant to postpone his deposition in the civil case until after the completion of the criminal case. *Saad*, 229 F.R.D. at 91. This prevents the defendant from potentially suffering the adverse inferences that can be drawn in the civil case from a refusal to testify.

As a result, the defense may well be able to obtain the government's documents early in the criminal case, providing the opportunity to shape a defense strategy in ways that might not be possible if the documents were produced later or not at all. More importantly, the defense can depose the government's key witnesses, learning how they will testify if called in the criminal case, while probing avenues for cross-examination and impeachment. These procedural advantages can greatly improve the chances of success in a criminal trial by neutralizing some of the advantages that prosecutors generally enjoy.

### Expanded Access to Exculpatory Material

Under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and *Giglio v. United States*, 405 U.S. 150, 153-55 (1972), a prosecutor is required to disclose exculpatory and impeachment evidence where such evidence is material to guilt or punishment. A defendant need not request such information; rather, due process imposes an affirmative obligation on the government to provide such evidence. *Kyles v. Whitley*, 514 U.S. 419, 432-33 (1995). The DOJ instructs its prosecutors that it is their "obligation ... in preparing for trial, to seek all exculpatory and impeachment information from all members of the prosecution team," which "include[s] federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant." Memorandum for Department Prosecutors from Deputy Attorney General David W. Ogden, Guidance for Prosecutors Regarding Criminal Discovery (Jan. 4, 2010) at Section A. Prosecutors are encouraged to "err on the side of inclusiveness when identifying the members of the prosecution team for discovery purposes" and are instructed that "[i]f a prosecutor has determined that a regulatory agency such as the SEC is a member of the prosecution team for the purposes of defining discovery obligations, that agency's files should be reviewed." *Id.* at Sections A & B.4.

As a result, in all cases involving joint investigations by DOJ and the SEC or other civil agencies—even if no civil enforcement action has been commenced—the defendant should be sure to demand that the government produce exculpatory or impeachment-related evidence not only from the prosecutor's office, but also such evidence existing in the files of the civil agency. Where parallel cases are pending, the defense can simultaneously open up a second front by seeking discovery of all such evidence in the civil case. This may help the defense obtain additional *Brady* and *Giglio* material from the civil agency. In addition, affirmative demands at the outset of the criminal case that prosecutors search other agencies' files may allow the defense to obtain such material far earlier than on the eve of trial, as is typical in criminal cases.

Prosecutors are sometimes resistant to searching other agencies' files for *Brady* and *Giglio* evidence. Courts, however, will require them to do so. *See, e.g., United States v. Gupta*, 848 F. Supp. 2d 491, 495 (S.D.N.Y. 2012) (prosecutors ordered to review SEC memoranda summarizing 44 jointly-conducted witness interviews and turn over any *Brady* material therein, observing that any other result would "make a mockery of ... the defendant's constitutional right to receive all information the Government has available to it that tends to show his innocence"); *United States v. Villa*, 12cr40 (D. Conn. Jan. 24, 2014) (because the "Government is charged with knowledge of all material gathered in connection [with] its investigation," it cannot simply state that it is "unaware" of *Brady* material in its "possession"); *United States v. Martoma*, 12 Cr 973 (S.D.N.Y. Jan. 6, 2014) (in joint DOJ-SEC investigation, *Brady* and *Giglio* obligations extended to communications between the SEC and counsel for cooperating witnesses); *United States v. JB Tax Prof'l Servs.*, 13-127 (E.D. La. June 5, 2014) (ordering government to supplement its responses to clearly state that all responsive materials have been produced or, if no such materials existed, a description "more particularly describing what efforts it has made through all appropriate agencies to meet its disclosure obligations").

### The Strategic Landscape

In light of these advantages, defense counsel must weigh a number of factors at the outset to decide whether to acquiesce in a government request to stay the civil case, or even affirmatively to seek such a stay. The key factors are: (1) the tactical advantages to be gained by earlier and more comprehensive discovery; (2) the possible disadvantage in the civil case of having to

assert the Fifth Amendment privilege; (3) the resources available to fight both cases; and (4) the relative priority assigned to defending both.

While the tactical advantages of fighting both battles at once are usually evident, as discussed above, the Fifth Amendment issue can be far more complicated. Since it will almost never be advisable to waive Fifth Amendment rights early in a prosecution, the question will often boil down to whether the cases can be positioned in such a way that the defendant can maintain his or her Fifth Amendment protections during the pendency of the criminal case while preserving the opportunity to testify in the civil matter after the criminal case has concluded. As seen in *Saad* and other cases, it is possible to convince the court that this is a just outcome, since it preserves the defendant's constitutional rights without burdening the government in either case.

Where resources are limited, it is necessary to consider the client's priorities. Given the more serious consequences of a loss in the criminal case, it will seldom be advantageous to have a civil case proceed first to a settlement or possible judgment that would exhaust the funds necessary for the criminal defense, so agreeing to a stay of the civil case may be a practical necessity.

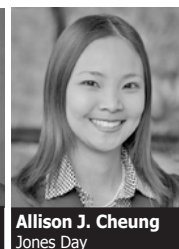
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When criminal and civil enforcement authorities conduct a joint investigation and commence parallel proceedings, it can seem that the government has the deck stacked in its favor. In reality, though, this scenario has a silver lining in the form of several key advantages for the defendant. Knowing what these advantages are and using them strategically can prove extremely valuable in the defense of both cases.

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