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Stays in Parallel Proceedings

The More Things Change …

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For decades, the government has sought, usually successfully, to stay discovery in civil cases, including SEC actions, when it is prosecuting a related criminal case. It has relied primarily on three arguments: that a stay will preclude defendants from "circumventing" more restrictive criminal discovery rules, prevent defendants from learning information that would allow them to "tailor" their defense to the government's proof, and promote judicial economy because a conviction would likely resolve the civil case. In recent cases, however, several judges have rejected these arguments and denied stays, requiring the government not simply to invoke general rationales but to identify particular facts justifying a stay.

For example, prosecutors moved to stay an SEC action in Arizona on the familiar ground that civil discovery would give the defendants a "road map" of the government's criminal case, allowing them "to tailor their defense to what others say about them." The court rejected this argument and denied the motion, finding the mere fact that the defendants would get more information in civil discovery did not constitute the specific prejudice required for a complete stay. The government's "generalized concern" did not outweigh the defendants' interest in quickly resolving the SEC case. *SEC v. Fraser*, No. 09 Civ. 443, Order (D. Ariz., May 29, 2009).

Similarly, Judge Frederic Block in Brooklyn denied a government petition to enjoin an arbitration that would include testimony from government witnesses in a related criminal case. The government argued that the arbitration would disclose the names of the government's witnesses, creating a risk that the defendants would ask the witnesses to testify falsely in the criminal trial, and reveal the government's case. The court rejected both arguments, reasoning that because the defendants were going to learn the witnesses' identity before trial anyway, the arbitration wouldn't increase any perjury risk. And the fact that the defendants would be better armed to find weaknesses in the government's case, like inconsistencies between a witness's arbitration and trial testimony, would not "prejudice" the government because those weaknesses are "legitimate fodder for the defense." According to the court, the government's arguments failed because criminal discovery rules are designed to guard against perjury and witness intimidation, not "to enshrine a tactical advantage in favor of the government." *United States v. FINRA*, 607 F. Supp. 2d 391, 393-94 (E.D.N.Y. 2009).

Likewise, Judge John G. Koeltl in Manhattan found that the government's desire to prevent tailoring did not justify a blanket stay of civil discovery because the prosecutors planned to produce witness statements before the criminal trial, giving the defendants an opportunity to tailor even without the benefit of civil discovery. Judge Koeltl also rejected the government's judicial economy argument. Although the court agreed that the civil action would not be resolved until after the criminal case, it found that allowing as much civil discovery as possible would be more efficient than a stay because the parties would have less to do after the criminal trial. *See SEC v. Cuti*, No. 08 Civ. 8648, Hearing Tr. (S.D.N.Y., Jan. 20, 2009).

New Trend, or a Shift in the Fight?

Decisions like these have prompted speculation that civil discovery is now wide open for defendants in parallel proceedings. A closer look, however, suggests that what defendants can actually get through civil discovery may not differ significantly from what will be produced in criminal discovery. Because the SEC and the U.S. Attorney's Office often work together and share whatever documents each has obtained, document productions in the civil and criminal cases likely will be very similar, with one key difference: witness statements and testimony. The SEC must produce all witness statements, including transcripts of investigative testimony or notes it possesses of interviews that weren't transcribed, which could be mined by defense counsel for defenses and favorable witnesses. By contrast, the Jencks Act (18 U.S.C. § 3500) and Criminal Rules require the U.S. Attorney's Office to produce only statements of witnesses actually testifying at trial, and then only after their direct testimony. Despite their obvious value to defendants, however, witness materials

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aren't likely to be produced in the SEC case because even courts that refuse to grant blanket stays will often preclude production of witness statements or depositions of government witnesses before the criminal trial.

Cases in Point

In *Cuti*, for example, although Judge Koeltl denied a blanket stay, he delayed depositions of four potential prosecution witnesses to prevent the defendants from circumventing criminal-discovery restrictions and to spare the expense of depositions that could be unnecessary if the defendants were convicted — reasons the same court found insufficient to warrant staying all discovery. And in another Brooklyn case where the court denied a complete stay, it nevertheless stayed all SEC depositions after it became clear that the criminal defendants were declining on Fifth Amendment grounds to produce documents or be deposed. Reasoning that "what's sauce for the goose is sauce for the gander," the court declined to put the government "in an unequal posture." *U.S. v. Cioffi*, No. 08 Cr. 415, Hearing Tr. (E.D.N.Y. July 14, 2009). *See also SEC v. Collins & Aikman*, No. 07 Civ. 2419, Hearing Tr. (S.D.N.Y. Sept. 6, 2007) (denying blanket stay, but precluding production of witness interview memos).

Declaring civil stays extinct also may be premature because some courts continue to grant blanket stays based on the government's traditional rationales. *See, e.g., SEC v. Stanford International Bank, Ltd.,* No. 09 Civ. 298, Order (N.D. Tex. Jan. 5, 2010) (complete stay will conserve judicial resources); *SEC v. Gordon*, 2009 WL 2252119 (N.D. Okla. 2009) (staying case to prevent the defense from getting broader discovery).

Defense Arguments for Stays

Blanket stays may not be all bad for defendants, who often seek discovery stays themselves. Although recent commentary often portrays defendants as doggedly opposed to civil discovery stays, the reality is much more complicated. True, defendants with substantial resources who don't plan to invoke the Fifth Amendment may benefit from civil discovery. But defendants with limited resources, or defendants who don't plan to testify, may not be giving up much by agreeing to a stay, and may want to move for a stay even if the prosecution doesn't, especially where key witnesses would decline to testify in the civil case until the criminal case was resolved. Ironically, in the situations where defendants seek stays, their arguments often mirror the government's.

Defendants argue, for instance, that civil discovery will give the government information it wouldn't otherwise receive, unfairly revealing defense strategy before the criminal trial. *See, e.g., Taylor, Bean, & Whitaker Mortgage Corp v. Triduanum Financial, Inc.*, 2009 WL 2136986 (E.D. Cal. July 15, 2009) ("exposing" strategy to the government through civil discovery "prejudices" the criminal case). And defendants argue that spending resources to fight on two fronts is unnecessarily burdensome when a conviction could resolve issues in the civil case. *See, e.g., In re WorldCom Securities Litigation*, 2002 WL 31729501 (S.D.N.Y. Dec. 5, 2002) ("there is little reason to deplete resources through payment of attorney's fees to defend or participate in civil litigation that … is essentially duplicative").

Unlike the government, defendants also can and do argue that civil discovery should be stayed because it forces them to choose between asserting their Fifth Amendment rights and forfeiting the civil case, or responding to discovery and risking self-incrimination. Courts frequently grant defendants' stay motions to avoid that dilemma. *See, e.g., Corcoran Law Group, LLC v. Posner*, 2009 WL 1739702 (S.D.N.Y. June 10, 2009) (defendant's interest in avoiding Fifth Amendment dilemma trumps plaintiff's interest in resolving civil case). Even when civil discovery is not stayed, some courts are willing to accommodate a defendant's Fifth Amendment concerns by delaying the defendant's deposition until after the criminal trial but allowing other depositions to proceed. *See, e.g., SEC v. Saad*, 384 F. Supp. 2d 692 (S.D.N.Y. 2005).

Although defendants' arguments for a stay echo the government's, defendants often have a disadvantage prosecutors don't: opposition from the SEC. When prosecutors move for a stay, the SEC almost always stands by without a fight. In contrast, when facing a defense stay motion, the SEC often argues that it shouldn't have to wait until after the criminal case to pursue an injunction or disgorgement. *See SEC v. Secure Investment Services, Inc.*, 2009 WL 982010 (E.D. Cal. April 10, 2009).

Conclusion

Because discovery stays can benefit both the prosecution and the defense, each side will continue to request, or resist, them when the need arises. As a result, no significant change in discovery practice in parallel proceedings is likely to come from piecemeal litigation. The landscape could change, however, if the government began producing witness statements well before trial, as some prosecutors' offices already do. That would fulfill the spirit of the DOJ's new discovery guidelines, which advise prosecutors to make "early and broad discovery." And it would make defendants more willing to agree to stays, saving resources for the criminal case, for both prosecutors and defendants.