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PERSPECTIVE

Taking the Fifth in parallel criminal and civil proceedings

By Joshua M. Robbins

Former Theranos president Sunny Balwani, currently facing simultaneous Department of Justice criminal and Securities Exchange Commission civil charges, has chosen to roll the dice, successfully opposing the government's request to stay the SEC case and allowing the two matters to proceed in parallel. This will afford Balwani an opportunity to obtain broader discovery from the government than in the usual criminal case. But it will also present a conundrum when it comes time for him to testify in the SEC case: speak and give prosecutors a binding road map to his defense, or invoke the Fifth Amendment and face potentially fatal adverse inferences in the civil case?

A similar dilemma often confronts litigants in more routine civil disputes, when the specter of criminal liability arises unexpectedly. Although a request to stay the case is a typical response, such requests are not always granted, and may present their own disadvantages. Parties and their counsel must thus be prepared to make hard choices as to whether to "take Five," and must understand the basic ground rules and strategic considerations informing that decision.

Consequences of Taking the Fifth

The advantages of asserting the Fifth Amendment privilege are perhaps obvious. A party's sworn testimony on a subject in a civil case can "lock in" that party's position in a later criminal trial, and the government can use any admission, misstatement, or inconsistency for impeachment or as substantive evidence. Invoking the Fifth and declining to testify avoids that risk.

The downside of invoking can depend on the forum. In federal court, taking the Fifth to avoid testifying can result in the court drawing adverse inferences or instructing the jury to do so. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). If the subject of the testimony is key to the case, that can be devastating.

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The rules may be very different in state court. Under California Evidence Code Section 913, when a witness takes the Fifth, the trier of fact may not draw any adverse inferences, and neither the court nor counsel may even comment on the invocation. The court may even be required to instruct the jury that it should not draw any conclusions from the party's failure to testify. A number of other states — such as Nevada, Oregon and New Jersey — have adopted similar rules.

But even in such a forum, asserting the privilege comes with a cost. The party or witness who asserts the privilege will generally be barred from providing testimony on that subject at trial or summary judgment. If the topic is critical, that could seriously disadvantage the party invoking the privilege. If it is less important, or if other witnesses or evidence are available to address it, the stakes are reduced.

A wrinkle appears when a civil case is in federal court, but involves claims under state law. Under FRE 501, state privilege law applies to such claims, including state rules barring adverse inferences. *See Home Indem. Co. v. Lane Powell Moss & Miller*, 43 F.3d 1322, 1328-29 (9th Cir. 1995). Thus, for example, if the testimony relates only to claims under California law, no adverse inferences may be drawn. If it relates to federal claims as well, the harsher federal rule applies. *See Wilcox v. Arpaio*, 753 F.3d 872, 876-77 (9th Cir. 2014).

A different issue arises when a non-party witness takes the Fifth. If the witness is closely aligned with or controlled by a party, some courts will allow adverse inferences to be drawn against that party. *See, e.g., Coquina Investments v. T.D. Bank N.A.*, 760 F.3d 1300, 1310-11 (11th Cir. 2014).

Strategic Considerations for Civil Litigants

These varying rules, and their potential impact, mean that parties to civil cases featuring criminal issues will need to treat assertion of the Fifth as a strategic issue. For example, where the defendant may have to assert the privilege as to an important issue, and the available state forum prohibits adverse inferences, the plaintiff may choose to file in federal court to obtain the adverse inferences offered there. But where the plaintiff has filed in such a state court, the defendant should think carefully before removing to federal court. By contrast, when the plaintiff faces criminal exposure, it may prefer to file in state court and avoid providing any basis for removal.

Choice of claims must also be considered. If looking to obtain adverse inferences, the plaintiff filing in federal court may prefer to focus on federal law claims, or at least to ensure that there is one to match each state law claim. Alternatively, if possible, the plaintiff may want to include claims under the law of a state that permits adverse inferences.

In each case, the analysis depends on the importance of the specific witness at issue. If the testimony bears directly on a key element of a claim or defense, these choices of forum and claim type can be critical. If not, the strategic concerns are reduced. A related consideration is whether there are alternative witnesses, documents, or other evidence to prove the party's point despite the assertion of the Fifth Amendment privilege. If so, the impact of the assertion is greatly reduced. But if the person invoking the privilege is the only one who can establish a certain point, the impact of the assertion will be heightened. Parties considering the impact of a privilege assertion on their settlement position or ongoing strategy should consider these points carefully, and consider them in devising their claims and defenses.

While the analysis may vary across cases and courts, one theme is consistent: The Fifth Amendment is not solely the concern of criminal practitioners, and civil litigators ignore it at their — and their clients' — peril. Given the impact that "taking Five" can have in parallel civil and criminal proceedings, a working knowledge of its application in the relevant civil forum is an indispensable part of the civil trial lawyer's strategic toolkit.

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