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5th Amendment Strategy For Parallel Civil, Criminal Litigation

By **Joshua Robbins** (August 8, 2019, 4:09 PM EDT)

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Civil litigation is tense in the best of times. But the pressure takes on a new dimension when the specter of criminal liability looms over the case. In several recent high-profile civil cases — such as actress Ashley Judd's defamation lawsuit against film producer Harvey Weinstein, gymnast Aly Raisman's sexual assault case against the U.S. Olympic Committee, and the U.S. Securities and Exchange Commission's action against former Theranos Inc. executive Sunny Balwani — the presence of parallel criminal proceedings has complicated the discovery process and raised vexing procedural questions.

Even in more routine cases, the mere prospect of potential criminal exposure or interest by government investigators can stymie the battle plans of both plaintiffs and defendants.

Such developments can confound even experienced civil litigators. No matter how important the litigation, the prospect of a criminal prosecution — with the devastating publicity, reputational harm and potential jail time it entails — inevitably raises the stakes. It also changes the game. The criminal process, both pre- and post-indictment, operates by a very different set of rules, norms and practices than does a civil lawsuit.

Perhaps the most difficult issue in these cases is whether a party or key witness will choose to assert the Fifth Amendment's privilege against self-incrimination, which applies in civil as well as criminal cases. It is important for both to understand the consequences taking the Fifth will have on the civil case, which can depend on the forum in which the civil case is proceeding. Whenever there is any prospect of criminal liability, both sides of the case should evaluate their strategy in light of these rules.

Fifth Amendment Scenarios

Parallel civil and criminal proceedings can arise in various circumstances, but two general categories predominate. The first involves actions by government civil enforcement agencies, such as the SEC or Federal Trade Commission, at the same time as a criminal investigation or prosecution by the U.S. Department of Justice, all based on the same conduct. A prime example is the Theranos case, which has featured both a criminal case against Balwani and former CEO Elizabeth Holmes with trial set for next summer, and a related SEC civil case against both.

The other main form of parallel proceedings concerns lawsuits brought by private parties. Often, this will involve actions by those claiming to be victims of crimes, such as assault in Judd's and Raisman's cases, or fraud and related white collar offenses, as in shareholder litigation. But accusations and evidence of potential illegal conduct can arise in almost any type of litigation, and often litigants who suspect the other side may have criminal exposure will seek to use the discovery process to ferret it out and gain leverage.

In these situations, taking the Fifth to avoid testifying can be a compelling option. Any statements made in a civil case can be used against the speaker, and possibly her company, in a later criminal case, and sworn statements can be particularly damaging. Invoking the privilege avoids that problem and leaves more leeway to defend the criminal matter.

Even a wholly innocent party may elect to assert the privilege, lest she become "ensnared by ambiguous circumstances,"[1] and her testimony "furnish a link in the chain of evidence" leading to unwarranted criminal charges.[2]

The Usual Tack: Seeking a Stay

To avoid the complications inherent in parallel proceedings and the drawbacks of invoking the Fifth Amendment, litigants facing criminal exposure often seek to have the civil case stayed until the criminal matter is fully resolved. But such resolution can take years, and courts may not be willing to stay a civil case for long — or at all.

For example, while the California federal court hearing the Judd-Weinstein lawsuit recently granted a stay in light of potential Fifth Amendment concerns resulting from the ongoing criminal case against Weinstein, a New York judge in a similar assault case brought by ten women against Weinstein refused to grant such a stay. Courts' discretion in this regard is broad.[3]

And in some cases, the party facing criminal proceedings may not want a stay because the parallel civil proceeding may provide an opportunity for discovery into the government's or complainant's case that would not be afforded in a criminal proceeding. For example, in the Theranos case, it was the DOJ that sought to stay the SEC's civil proceeding, and Balwani who successfully opposed the stay. This will give Balwani's counsel the opportunity to demand discovery from the SEC that may bear on the DOJ's case, and to depose key government witnesses, potentially obtaining admissions or inconsistent statements that will undermine their trial testimony.

Consequences of Taking the Fifth

If staying the civil case is not an option, the hard question arises: whether to assert the Fifth Amendment privilege or waive it and testify. The downside of invoking the privilege may depend on where the civil case is pending. In federal court, a party's taking the Fifth to avoid testifying or answering discovery can result in the court drawing adverse inferences that the response would have been incriminating and damaging to the party's civil case, or instructing the jury to do so.[4]

That can be devastating and often fatal to the party's position, depending on the relevance of the issue to the key claims or defenses. Balwani may well face this dilemma as the SEC case against him moves forward.

But the rules can be quite different in state court. In California, for example, Evidence Code Section 913

provides that when a witness invokes the privilege against self-incrimination, the trier of fact may not draw any adverse inferences, no negative presumption will arise, and neither the court nor counsel may even comment on the invocation. The party asserting the privilege may even ask the court 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.

That does not mean that taking the Fifth in such a state court civil case is cost-free. The party or witness who asserts the privilege to avoid responding to deposition questions or other discovery on a certain subject will generally be barred from providing testimony on that subject at trial or summary judgment. The loss of such testimony, depending on its importance to claims or defenses, could seriously disadvantage the party invoking the privilege. If the topic is less critical, or if other witnesses or evidence is available to address it, the problem is less acute.

Things get slightly more complicated when a civil case is in federal court, but involves claims under state law. Under Federal Rule of Evidence 501, state privilege law applies to such state law claims. That includes state rules barring the drawing of adverse inferences from assertion of evidentiary privileges.[5]

Thus, if the testimony or evidence at issue pertains only to claims under the law of a state with a rule like California's, no adverse inferences may be drawn. If it relates to federal claims as well, the harsher federal rule applies.[6]

Another wrinkle may appear when a nonparty witness takes the Fifth. Some courts have allowed litigants to force a witness aligned with the other side to assert the privilege in front of the jury, and permitted the jury to draw adverse inferences against the related party in that case.[7]

Whether this tactic is permitted is generally decided on a case-by-case basis, considering such factors as the nature of the witness's relationship to the party, the degree of the party's control over the witness, how closely aligned the witness's interest in the litigation is with that of the party, and the role of the witness in the litigation.

Strategic Considerations for Civil Litigants

Because the choice to invoke or not invoke the Fifth Amendment can have such serious consequences, both sides in a civil case where criminal issues arise should treat it as a key point of strategy. Where it appears that the defendant or a closely aligned witness may have to assert the privilege as to an important disputed claim or defense, and the available state forum prohibits adverse inferences or reference to the party's silence, the plaintiff may consider filing in federal court to obtain the adverse inferences offered there.

For the same reasons, where the plaintiff has filed in such a state court, the defendant should think carefully before removing to federal court. When the roles are reversed and it is the plaintiff who faces a potential criminal issue, the plaintiff may prefer to file in state court and avoid providing any basis for removal.

The issue can also influence which claims a plaintiff chooses to file. In seeking to maximize the impact of adverse inferences, the plaintiff filing in federal court may prefer to focus on federal law claims, or at least to ensure that there is a federal claim to match each state law claim. Alternatively, if possible, the plaintiff may want to include claims under the law of a state that, unlike California, permits adverse inferences in the case of a Fifth Amendment assertion.

In any event, much will depend on the importance of the specific witness or evidence to the claims at issue. If the testimony or evidence that is likely to draw the Fifth Amendment assertion bears directly on a disputed element of the claim in question or a key defense, these questions regarding forum and claim type will loom large.

If not, the adverse inference may not be appropriate even in federal court, and the issue may be less important. Parties considering the impact of a privilege assertion on their settlement position or ongoing strategy should weigh this point heavily, and perhaps craft their claims and defenses with it in mind.

For similar reasons, the availability of alternative witnesses on a given point can prove critical. If other witnesses who do not face criminal exposure can testify to the same facts as the party or witness taking the Fifth, the impact of the latter's silence or even an adverse inference may be mitigated. This is particularly true if there are documents or other evidence to corroborate the substitute witnesses. On the other hand, if the person invoking the privilege is the only one available to prove a certain point, the impact of the assertion will be heightened.

Finally, it is important to be realistic about the likelihood of criminal liability or a government investigation if none is already in progress. Prosecutors and law enforcement agents are often, and rightfully, wary of being drawn into a private civil dispute, where one side or the other may seek to manipulate them for advantage. In terms of scienter, materiality, strength of evidence and public importance, civil fraud allegations will not typically rise to the level that criminal authorities would deem them worthy of pursuit.

And litigants' threats to go to the authorities frequently amount to no more than posturing. Evaluating how important the Fifth Amendment will be to a case requires a proper understanding of the substantive criminal law and an understanding of law enforcement practices and priorities.

In any event, civil litigators cannot afford to regard the Fifth Amendment as solely the province of criminal practitioners. Given the explosive effect its invocation can have on the outcome of a civil case, a working knowledge of the amendment and the rules governing its application should be part of the civil trial lawyer's everyday arsenal.

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[1] Ohio v. Reiner, 532 U.S. 17, 21 (2001)

[2] Hoffman v. United States, 341 U.S. 479, 486-487 (1951)

[3] Louis Vuitton Malletier S.A. v. LY USA, Inc., 676 F.3d 83, 96-97 (2d Cir. 2012)

[4] Baxter v. Palmigiano, 425 U.S. 308, 318 (1976)

[5] See Home Indem. Co. v. Lane Powell Moss & Miller, 43 F.3d 1322, 1328-1329 (9th Cir. 1995).

[6] See Wilcox v. Arpaio, 753 F.3d 872, 876-877 (9th Cir. 2014).

[7] See, e.g., Coquina Investments v. T.D. Bank N.A., 760 F.3d 1300, 1310-1311 (11th Cir. 2014).