

CRIMINAL CHARGES V. CIVIL DISCOVERY WHO WINS?

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Parallel and competing criminal and civil cases are a fact of life in my practice areas but never fail to cause consternation to risk management. The trucking and transportation industry must constantly contend with the possibility of criminal charges against drivers, especially in highly publicized fatality cases. In the professional liability world, a negligent act, such as a lawyer failing to file suit within the statute of limitations, may also be connected to an act giving rise to criminal charges, such as stealing the same client's settlement obtained from another defendant. In Las Vegas, parallel criminal and civil proceedings also occur where gamblers fail to pay certain forms of debt to a casino. The district attorney may pursue criminal charges while the casino pursues its civil remedies.

When these competing, parallel proceedings occur, they create tension arising from the interaction of a criminal defendant's Fifth Amendment rights against self-incrimination versus the comparably minimal restrictions of civil discovery. If the criminal defendant participates in civil discovery before the criminal charges are resolved, the information gathered could be used against him in the criminal case. Most often, the criminal defendant wants to stay the civil matter pending the outcome of the criminal matter. The civil plaintiffs, and sometimes other civil parties, typically resist this request. Yet if the criminal defendant does not participate in civil discovery, he risks an adverse judgment that may, in some circumstances, flow to an employer. If a criminal defendant invokes his Fifth

Amendment rights during the course of parallel civil discovery, what happens?

I. THE FRAMEWORK: WEIGHING OPTIONS AND RISKS

In my home state of Nevada, there was no guidance on this issue until *Aspen Fin. Servs. v. Dist. Ct.*, 128 Nev. Adv. Op. 57, 289 P.3d 201 (2012) issued. The case arose from certain real estate investments which failed. During the civil lawsuit

[t]he Aspen defendants filed a motion with the district court to stay any depositions and written discovery that would require their employees and officers or Guinn to make testimonial statements. The Aspen defendants asserted that the Federal Bureau of Investigation



(F.B.I.) had initiated a criminal investigation into their activities at the behest of the Gragson plaintiffs. They further asserted that they had been served with a federal grand jury subpoena seeking information about various subjects, including the loans for the Milano property. In addition, the Aspen defendants argued that the Gragson plaintiffs had been, and would continue, funneling discovery obtained in the civil proceeding to the F.B.I. After an extensive hearing, the district court issued a written order summarily denying the motion without prejudice.

Id. The court noted the difficult choice confronting a party to both civil and criminal proceedings.

Here, if discovery is not stayed, Guinn, in particular, will face a difficult choice when the Gragson plaintiffs depose him. He can either waive his Fifth Amendment privilege and risk revealing incriminating information to criminal investigators, or he can assert his privilege and forego the opportunity to deny the allegations against him under oath, thereby effectively forfeiting the civil suit.

Id. (citations and quotations omitted). These were the same problems observed by federal courts. Milton Pollack, Sr. J., U.S. Dist. Ct., S.D.N.Y., *Parallel Civil and Criminal Proceedings*, 129 F.R.D. 201, 202 (Oct. 17-19, 1989).

The Supreme Court of Nevada chose to adopt a framework used by the Ninth Circuit to address this predicament.

[C]ourts should analyze ‘the extent to which the defendant’s fifth amendment rights are implicated as well as the following nonexhaustive factors: (1) the interest of the plaintiffs in proceeding expeditiously with [the] litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources; (4) the interests of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil and criminal litigation.

Id. (quoting *Keating v. Office of Thrift Supervision*, 45 F.3d 322 (9th Cir. 1995)). It ap-

pears other states and federal circuits have considered similar standards. Applying these criteria to the facts, the court ultimately concluded a stay was not appropriate.

II. PRACTICAL CONSIDERATIONS FOR HANDLING THE TENSION

For practical purposes, what can clients do when this problem arises? As the courts have noted, the answer is case specific. For instance, Nevada is like many jurisdictions in that misdemeanor traffic convictions are typically inadmissible. Pursuing a stay of civil discovery pending resolution of a misdemeanor traffic charge may cost more to obtain than it is worth. To explore other factors to consider, assume a trucking accident has occurred with multiple fatalities and the truck driver has been charged with at least one felony.

Step One: What is the driver going to do? Do not necessarily assume the driver will invoke his Fifth Amendment rights during the civil aspect of the case. He may have reasons to actively and vocally defend himself. However, if the driver has been charged and will invoke his Fifth Amendment rights, then it seems the proper procedure is to file a motion in the civil case seeking a stay of discovery pending the resolution of the criminal charges.

Step Two: Will the plaintiffs oppose the motion to stay? This is a significant question. Opposing this motion is the more active and expensive path for plaintiffs, but also seems more common. If the court denies the motion for stay, the plaintiffs must then go through the normal discovery process, which may force the driver to assert his Fifth Amendment rights. Should he do so, it could result in summary judgment against him unless other, sufficient evidence can be presented. Nevada explicitly contemplated this result in *Francis v. Wynn Las Vegas, LLC*, 27 Nev. Adv. Op. 60, 262 P.3d 705 (2011) where Girls Gone Wild founder Joe Francis invoked Fifth Amendment rights during deposition. *Francis* concluded Fifth Amendment rights may be invoked in civil litigation, however “a claim of privilege will not prevent an adverse finding or even summary judgment if the litigant does not present sufficient evidence to satisfy the usual evidentiary burdens in the litigation.” *Id.* at 711 (citation and quotation omitted).

Not opposing the motion for stay seems the more cost-effective route, especially for plaintiffs’ counsel retained pursuant to a contingency fee. In doing so, the State effectively prosecutes the plaintiffs’ liability case at no cost to him. If the driver is convicted, Nevada’s NRS 41.133 establishes a judgment of conviction will impose civil li-

ability, leaving only damages for trial. Even if the State does not obtain a conviction, it performs much of the work required to prosecute a civil claim. Plaintiffs’ counsel also gets a free mock trial experience to see how the case plays to a jury. For this reason, some transportation clients have elected to hire separate criminal counsel to defend the driver so long as the civil case remains pending. My office has erected partial firewalls in the past to enable an independent criminal defense while coordinating, where possible, the criminal and civil defenses.

Assuming the motion for stay is opposed, know the motion faces an uphill battle. *Aspen* noted a stay is not constitutionally required and is an extraordinary remedy only proper in extraordinary circumstances. It cited to case law from around the country concluding similarly.

Step Three: Will the court grant the motion to stay civil discovery? A preliminary concern of courts considering these motions is the degree of overlap between the civil and criminal cases. If a driver is criminally charged for the same accident that is the subject of the civil case, the degree of overlap is very high. However the driver’s pending charges for tax evasion would result in very little overlap and would not favor a stay of civil discovery.

If the cases sufficiently overlap, the courts then consider the status of the criminal matter. Generally, if criminal charges have not been filed civil courts will be reluctant to grant a stay absent special circumstances demonstrating an indictment is inevitable. Assuming these factors are satisfied, the courts then proceed to apply the five factors discussed above.

In summary, competing criminal and civil claims present difficult risk management scenarios. They can complicate defense efforts and increase the cost of defense by necessitating civil and criminal counsel. Clients who proactively address the problems these competing interests present have the best chance to minimize potential adverse results.



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