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IMPLICATIONS OF PLEADING THE FIFTH AMENDMENT IN A SECURITIES FRAUD CLASS ACTION

By
Glen DeValerio
Kathleen M. Donovan-Maher
Julie A. Richmond
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INTRODUCTION

The Fifth Amendment privilege has long been synonymous with criminal proceedings. Indeed, it was virtually unheard of for a defendant in a civil securities action to invoke the Fifth Amendment privilege. Recently, as more and more companies accused of securities fraud face parallel prosecutions – civil suits from shareholders as well as criminal actions – invocation of the Fifth Amendment privilege in the civil arena is becoming increasingly common.

A look at some of the most notorious financial frauds in history illustrates this trend. Enron, WorldCom, Adelphia and HealthSouth all involve situations where the company and its management are accused of securities fraud in simultaneous criminal actions and securities class actions. While these companies immediately come to mind, they are far from the exception. Faced with severe legal penalties and lengthy prison terms, the defendants in several of these cases, as well as others, have sought the protection of the Fifth Amendment privilege in the parallel civil actions, with varying degrees of success.

This article addresses the implications of pleading the Fifth Amendment in shareholder lawsuits by answering several key questions: Who can invoke the Fifth Amendment privilege against self-incrimination? When can the privilege be invoked? What are the implications of

[1] Glen DeValerio and Kathleen M. Donovan-Maher are partners in the Boston office of Berman DeValerio Pease Tabacco Burt & Pucillo. Julie A. Richmond is an associate in the Boston office.

asserting the Fifth Amendment privilege? When is the Fifth Amendment privilege waived? What litigation strategies should be utilized for the clients' best interests when facing parallel civil and criminal proceedings?

I. WHEN DOES A WITNESS IN A CIVIL ACTION HAVE THE RIGHT TO INVOKE THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION?

The United States Supreme Court has held that the Fifth Amendment privilege may be asserted in any civil, criminal or administrative proceeding. Kastigar v. United States, 406 U.S. 441, 444 (1972). The privilege, however, is only applicable to individuals and does not protect corporations. Braswell v. United States, 487 U.S. 99, 105 (1988) ("a corporation has no Fifth Amendment privilege"). The Fifth Amendment privilege has been extended to resident foreigners of the United States, but cannot be invoked by non-resident foreigners. See Bear Stearns & Co. v. Wyler, 182 F. Supp. 2d 679, 680 (N.D. Ill. 2002); United States v. Balsys, 524 U.S. 666, 671 (1998). One recent case, United States v. Bin Laden, 132 F. Supp. 2d 168 (S.D.N.Y. 2001), allowed the extension of the Fifth Amendment protection to a non-resident foreigner overseas where the individual was the subject of a United States criminal investigation. Id. at 181.

A witness may exercise his right to avoid self-incrimination only where he has reasonable cause to suspect the possibility of subsequent prosecution from a direct answer.[2] Hoffman v. United States, 341 U.S. 479, 486 (1951). The fear of foreign prosecution, however, is insufficient to justify the invocation of the Fifth Amendment privilege against self-incrimination.

[2] This standard has been expressed in a number of different ways. The Ninth Circuit held that the mere possibility of criminal prosecution is all that is needed to properly invoke the Fifth Amendment. In re Seper, 705 F.2d 1499, 1501 (9th Cir. 1983). On the other hand, the Seventh Circuit held that when there is only "but a fanciful possibility" of prosecution, the allowance of the Fifth Amendment privilege is improper. National Acceptance Co. of America v. Bathalter, 705 F.2d 924, 927 (7th Cir. 1983).

Balsys, 524 U.S. at 671. To be incriminating, the potential testimony must either provide direct evidence of a crime or "furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime."[3] Hoffman, 341 U.S. at 486. Questions do not have to relate directly to criminal activity; the answer only has to be a "stepping stone" in the government's case. Estate of Fisher v. Commissioner of the IRS, 905 F.2d 645, 648 (2d Cir. 1990). In fact, the witness can invoke the privilege even while maintaining his innocence. Grunewald v. United States, 353 U.S. 391, 421-22 (1957).

A witness who invokes the Fifth Amendment privilege is not exonerated from answering merely because he declares that his answer would tend to incriminate him. Hoffman, 341 U.S. at 486. The court must determine whether the witness' silence is justified and protected by the privilege. Id. In so doing, courts reject blanket assertions of the Fifth Amendment privilege and instead require review of whether each individual question poses a threat of self-incrimination. Id.; see also United States v. Malnik, 489 F.2d 682, 685-86 (5th Cir. 1974) (held that blanket claims of Fifth Amendment privilege are impermissible); In re Livent, Inc. Noteholders Sec. Litig., 151 F. Supp. 2d 371, 443-44 (S.D.N.Y. 2001) (held defendant's blanket assertion of Fifth Amendment privilege against the entire complaint was "overly broad and unnecessary"). For example, the Livent court granted plaintiffs' motion to strike defendants' answer and directed the defendants to parse through the complaint to determine the "validity and necessity" of their Fifth

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[3] It should be noted that one commentator stated that "a response 'tends to incriminate' as long as it *might* provide a clue leading investigators to discover facts that *could* constitute links in a chain of circumstantial evidence proving the invoker's criminal conduct." Robert Heidt, The Conjurer's Circle--The Fifth Amendment Privilege in Civil Cases, 91 Yale L.J. 1062, 1071-72 (1982) (emphasis added). The "might provide" and "could constitute" language used by the commentator appears to be less stringent than the "would furnish" language used by the Court in Hoffman. The Ninth Circuit also noted that the privilege is available if a response "could possibly" constitute a link. In re Master Key Litig., 507 F.2d 292, 293-94 (9th Cir. 1974).

Amendment assertions with respect to each individual allegation. Livent, 151 F. Supp. 2d at 444. Plaintiffs' motion for judgment on the pleadings, however, was denied. Id. at 444-45.

The Fifth Amendment privilege may be invoked at different times throughout the proceedings. Individuals not only can invoke the privilege while on the witness stand but also in submitting answers to allegations in a complaint, refusing to respond to interrogatories, document requests, requests for admissions and questions at deposition. See Antonio v. Solomon, 42 F.R.D. 320, 322 (D. Mass. 1967) (answering complaint); Fisher v. United States, 425 U.S. 391, 410 (1976) (document requests); Gordon v. FDIC, 427 F.2d 578, 580 (D.C. Cir. 1970) (response to interrogatories); Woods v. Robb, 171 F.2d 539 (5th Cir. 1948) (requests for admissions); Duffy v. Currier, 291 F. Supp. 810 (D. Minn. 1968) (depositions).

Clearly, defense counsel have grown increasingly concerned that what their clients admit in a civil proceeding will return to haunt them in a parallel criminal prosecution. Indeed, defendants now attempt to plead the Fifth even before a parallel criminal case has been commenced. The ongoing shareholder action against the now bankrupt speech technology firm, In re Lernout & Hauspie Sec. Litig., Nos. CIV.A. 00-11589-PBS, CIV.A. 02-10302-PBS, CIV.A. 02-10303-PBS, CIV.A. 02-10304-PBS (D. Mass.) is a good example. Recently, defendant and former CEO Gaston Bastiaens asserted the Fifth Amendment privilege when answering the complaint and responding to discovery requests. At the time, there was no United States criminal case pending against Bastiaens.[4] Similarly, in the pending shareholder case against Symbol Technologies, In re Symbol Techs. Litig., No. 02-CIV-1383-LDW (E.D.N.Y.), defendant and former CFO Kenneth Jaeggi asserted his Fifth Amendment rights when filing his

[4] As discussed supra, it is unlikely that Bastiaens would ultimately prevail in a challenge to his invoking the Fifth Amendment since he is a non-resident foreigner who at the time was only facing the threat of prosecution in Belgium. See Wyler, 182 F. Supp. 2d at 680; Balsys, 524 U.S. at 671.

answer to the plaintiffs' complaint even though, at the time, no criminal case had been brought against Jaeggi individually.

The mere threat of criminal proceedings may not be enough to invoke the Fifth Amendment.[5] Arguably, until a parallel proceeding is actually initiated, the defendant should be compelled to respond to a complaint or discovery. After all, a defendant can argue in any securities fraud class action that a possibility – however remote – of criminal prosecution exists and thereby claim the protection of the Fifth Amendment.

The defendants in some of Wall Street's most egregious fraud cases – Enron, HealthSouth and WorldCom – have repeatedly invoked the Fifth Amendment. Appearing before Congressional committees, the former top officers of these companies refused to answer lawmakers' questions claiming the Fifth Amendment privilege. Former WorldCom CEO Bernard Ebbers, for example, even invoked the Fifth when asked if he slept well at night.[6] Ebbers, who appeared before Congress in July 2002, said he was advised by counsel to plead the Fifth because: "one, the investigations appear to be open-ended examinations of a variety of activities at WorldCom, the details of which have not been provided to me. Second, I have not been advised of the specific conduct of mine that is being called into question. And third, I understand that preliminary statements can be taken out of context." Jim Hopkins, Ebbers Opened Door to More Questioning When He Took Fifth, USA Today, July 9, 2002, at B2.

Enron defendant Andrew Fastow sought similar protections. Although the former Enron CFO has since struck a deal with the Department of Justice and the Securities and Exchange

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[5] See footnote 2, supra.

[6] Jim Hopkins, Ebbers Opened Door to More Questioning When He Took Fifth, USA Today, July 9, 2002, at B2.

Commission, his lawyers initially tried to limit his civil liability while the criminal case was pending. In June 2002, Fastow asked U.S. District Court Judge Melinda Harmon to shield him temporarily from testifying in any of the civil cases by issuing a stay against the civil suits as to Fastow until the criminal proceedings were resolved. Fastow's counsel argued that "if he responds to discovery requests in the civil action, he risks his Fifth Amendment privilege against self-incrimination and his answers might be used to prosecute him." In re Enron Corp. Sec. Litig. & ERISA Litig., MDL 1446 at 5 (S.D. Tex. Mar. 24, 2003) (Memorandum and Order Re Motions Filed by Enron Insider Defendant Andrew S. Fastow). Judge Harmon granted Fastow's motion and issued a stay postponing discovery until resolution of his criminal liability. Id. at 23.

In another Enron-related matter, former Chairman Kenneth L. Lay recently agreed to produce all documents called for in a subpoena from the SEC, which were previously withheld based on Fifth Amendment grounds. SEC v. Lay, Misc. No. 03-1962 (D.D.C. Nov. 7, 2003) (Stipulation and Order Requiring Production of Documents). In response to Lay's claim of Fifth Amendment privilege, the SEC argued that the records sought to be protected were "corporate records" and since a corporation has no Fifth Amendment rights, an individual cannot resist the production of corporate records based on the Fifth Amendment, even where the records might tend to incriminate the individual personally. SEC v. Lay, Misc. No. 03-1962 (D.D.C. Sept. 29, 2003) (Memorandum of the SEC Requiring Obedience to Subpoena at 13, 15). The Stipulation between Lay and the SEC allows the SEC to use the documents for any law-enforcement purpose, including in any future action or civil proceeding it may bring against Lay. SEC v. Lay, Misc. No. 03-1962 (D.D.C. Nov. 7, 2003) at 1-2 (Stipulation and Order Requiring Production of Documents). The Stipulation also provides that Lay will not assert the Fifth Amendment as a

basis to exclude the admission into evidence of these documents in pre-trial proceedings or for any other law-enforcement purpose of the SEC. Id.

HealthSouth's former CEO, meanwhile, tried last year to postpone an appearance before a Congressional committee until the criminal investigation was completed. This effort proved unsuccessful. In a letter to the oversight and investigations subcommittee of the House Energy and Commerce Committee, Richard M. Scrushy's lawyer asked for a delay: "All of us have seen the staff of this committee work on past hearings in conjunction with the Department of Justice to create perjury traps."[7] Ultimately, Scrushy did appear before the committee, joining the parade of former scandalized Wall Street veterans who have invoked their Fifth Amendment privileges. Ironically, at the same time Scrushy refused to answer lawmakers' questions, he agreed to an interview "with no questions barred" by Mike Wallace of the CBS News program "60 Minutes."[8]

While all of these disgraced executives acted within their rights by asserting the Fifth Amendment privilege, they run the risk that their silence could ultimately harm them in the civil suits still pending, as discussed below.

II. WHEN IS THE FIFTH AMENDMENT PRIVILEGE WAIVED?

A witness who does invoke the Fifth Amendment must be careful not to inadvertently waive that protection. While simply asserting one's innocence does not constitute a waiver of the Fifth Amendment privilege, the privilege can be waived either by explicit acts or by

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[7] Milt Freudenheim, HealthSouth Scandal Doesn't Slow Former Chief, NY Times, Sept. 26, 2003, at C1.

[8] Id. In addition to Scrushy, WorldCom's Bernie Ebbers and Martha Stewart have both invoked the Fifth Amendment privilege while at the same time telling their stories to the media. Carrie Johnson, Ex-CEOs Risk Taking Defense To Court Of Public Opinion, The Boston Globe, Oct. 26, 2003, at B1.

inference. See Grunewald, 353 U.S. at 421-22. If a witness waives the privilege by disclosing an incriminating fact, he also waives the privilege as to the details of the fact or matters disclosed. Rogers v. United States, 340 U.S. 367, 373 (1951). As noted in Rogers, a contrary rule "would open the way to distortion of facts by permitting a witness to select any stopping place in the testimony." 340 U.S. at 371. If, however, the disclosure of additional details of the fact or matter disclosed will tend to further incriminate the witness then he may re-invoke his privilege. In re Master Key Litig., 507 F.2d at 294 (citing Shendal v. United States, 312 F.2d 564, 566 (9th Cir. 1963)).

Waiver of the Fifth Amendment may also be implied, though courts have generally applied a presumption against implied waiver. Emspak v. United States, 349 U.S. 190, 197-98 (1955). In Klein v. Harris, 667 F.2d 274, 287-88 (2d Cir. 1981), the court held that a Fifth Amendment waiver will be implied if: (1) the witness' prior statements have created a significant likelihood that the finder of fact will have a distorted view of the truth; and (2) the witness had reason to know that his prior statements would be interpreted as a waiver of the Fifth Amendment's privilege against self-incrimination.

III. WHEN WOULD A WITNESS BE SUBJECT TO ADVERSE INFERENCES FOR INVOKING THE FIFTH AMENDMENT PRIVILEGE?

Exercising the Fifth Amendment right can have a significant downside for defendants: it can potentially increase their civil liability. Jurors in criminal cases typically are not told when a defendant takes the Fifth. If criminal jurors are informed, they are told not to make any inference of guilt. In civil cases, however, an adverse inference may be drawn if a defendant chooses to invoke the Fifth Amendment. Some courts have likened the Fifth Amendment to a Hobson's choice for civil defendants – either face a very substantial risk of self-incrimination if a defendant chooses to defend against civil charges or risk civil liability by allowing an adverse

inference to be drawn if the privilege is asserted.

In terms of the quandary, requiring a civil defendant to make this difficult decision is not unconditional. Baxter v. Palmigiano, 425 U.S. 308, 317-18 (1976) (Fifth Amendment does not bar adverse inference where privilege is claimed by a party to a civil cause); In re WorldCom Sec. & ERISA Litig., Nos. 02 Civ. 3288-DLC, 02 Civ. 4816-DLC, 2002 WL 31729501, at *7 (S.D.N.Y. Dec. 5, 2002). In fact, courts have allowed adverse inferences to be drawn against a party that invokes the Fifth Amendment privilege in order to prevent the "use of the privilege as a weapon in civil litigation." Penfield v. Venuti, 589 F. Supp. 250, 255 (D. Conn. 1984). The inference allows a civil plaintiff to moderate the disadvantage faced when he is unable to obtain information due to a witness' assertion of his Fifth Amendment privilege. SEC v. Musella, 578 F. Supp. 425, 428 (S.D.N.Y. 1984).

The United States Supreme Court has held that invoking the privilege cannot, however, amount to an automatic penalty. Lefkowitz v. Cunningham, 431 U.S. 801 (1977) (held that requiring public officials to testify or lose their office is an automatic penalty in violation of the Fifth Amendment); Baxter, 425 U.S. at 317 ("It is thus undisputed that [a defendant's] silence in and of itself is insufficient to support an adverse decision…"); Spevack v. Klein, 385 U.S. 511 (1967) (attorney may not be disbarred for exercising the privilege); Garrity v. New Jersey, 385 U.S. 493 (1967) (testimony compelled by threatened loss of employment cannot be used in subsequent criminal prosecution). For example, courts have held that a defendants' silence under the Fifth Amendment cannot by itself form the basis for dismissal on summary judgment grounds. As the Eleventh Circuit noted in United States v. Premises Located at Route 13, 946 F.2d 749, 756 (11th Cir. 1991), the Fifth Amendment is violated when a defendant in both a civil and criminal case is required to choose between waiving his Fifth Amendment privilege and

losing the civil case on summary judgment. Id. Similarly, the Seventh Circuit held that a defendants' claim of Fifth Amendment privilege is not deemed an admission of the allegations of the complaint, warranting summary judgment. Bathalter, 705 F.2d at 932.

A number of courts will consider the adverse inference in conjunction with other evidence when weighing the totality of the evidence for purposes of a summary judgment motion. Baxter, 425 U.S. at 317-18; Pagel, Inc. v. SEC, 803 F.2d 942, 947 (8th Cir. 1986) (adverse inferences can be used in conjunction with other relevant factors to corroborate established findings); Musella, 578 F. Supp. at 429-30 (defendant's refusal to testify and produce records is a factor that may be considered by the trier of fact). At least one district court, however, has refused to rely on any adverse inferences in its evaluation of the evidence, noting "[t]he propriety of drawing an inference against the defendants in this action based on their invocation of the privilege is especially problematic in the context of a motion for summary judgment, where a court is admonished to construe all evidence, including the defendants' silence, in a light most favorable to the non-moving party." Fidelity Funding of Cal., Inc. v. Reinhold, 79 F. Supp. 2d 110, 116-17 (E.D.N.Y. 1997). The Second Circuit has also held that an adverse inference may be constitutionally impermissible if the witness faces a severe deprivation due to his assertion of the Fifth Amendment privilege. See United States v. One Parcel of Property Located at 15 Black Ledge Drive, Marlborough, Conn., 897 F.2d 97, 103 (2d Cir. 1990) (court noted that adverse inferences in a civil forfeiture proceeding involving a home poses a troubling question).

There has been criticism regarding the use of adverse inferences when a Fifth Amendment privilege is asserted. One commentator noted that adverse inferences potentially pressure a deponent or party in a civil proceeding to testify or risk having the adverse inference

drawn from his silence. Marc Youngelson, The Use of 26(c) Protective Orders: "Pleading the Fifth" Without Suffering "Adverse" Consequences, 1994 Ann. Surv. Am. L. 245, 263-64 (1995). Therefore, the opposing party may have an incentive to find a witness who will invoke the privilege given that the opposing party could then gain ground with little or no cost. Id. The use of adverse inferences may also encourage increased litigation due to the strong incentive parties have to litigate the issue since the adverse inference could be seen as a loss to the silent party and a gain to the questioner. Id. at 266-65.

IV. LITIGATION STRATEGIES WHERE THE FIFTH AMENDMENT IS INVOKED

A. Staying Civil Proceedings

Faced with the Hobson's choice of either risking self-incrimination or an adverse inference, defendants facing parallel criminal actions and securities fraud actions increasingly are requesting courts issue a stay of discovery or stay of the entire civil proceeding pending resolution of the criminal action.

A defendant has no constitutional right to stay a parallel civil proceeding pending the outcome of the related criminal action. Arden Way Assoc. v. Boesky, 660 F. Supp. 1494, 1496 (S.D.N.Y. 1987). Rather, the decision to stay the civil proceeding until the conclusion of the criminal litigation lies entirely within the discretion of the court. See In re Worldcom, 2002 WL 31729501, at *3. Under the Federal Rules of Civil Procedure, a judge may "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c). A stay of the civil proceeding is appropriate depending upon the particular circumstances of the case. United States v. Kordel, 397 U.S. 1, n. 27 (1970). Accordingly, the appropriateness of a stay must be determined on a case-by-case basis.

In determining whether a stay should be entered, courts employ a balancing test using the following six factors:

> "(1) The extent to which issues in the criminal case overlap with those presented in the civil case;
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> (2) The status of the criminal case, including whether the defendant has been indicted;
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> (3) The private interests of the plaintiff in proceeding expeditiously versus the prejudice to plaintiff caused by the delay;
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> (4) The private interests of, and burden on, the defendant;
>
> (5) The interests of the Court; and
>
> (6) The public's interest."

In re CFS-Related Sec. Fraud Litig., 256 F. Supp. 2d 1227, 1236-37 (N.D. Okla. 2003). See In re Worldcom, 2002 WL 31729501, at *3-4; Boesky, 660 F. Supp. at 1496-97.

1. Overlap of Issues In Criminal and Civil Cases

The In re Worldcom court noted that "[t]he first question to be resolved is the extent to which the issues in the criminal case overlap with those present in the civil case, since self-incrimination is more likely if there is a significant overlap." In re Worldcom, 2002 WL 31729501, at *4 (citations omitted). Clearly, there is likely to be a complete overlap of issues presented in a parallel criminal action and securities fraud class action, weighing in favor of a stay. See id.; In re CFS, 256 F. Supp. 2d at 1237.

2. Status of the Criminal Case

In analyzing the status of the criminal case, courts primarily focus on whether the defendant has been indicted. See Volmar Distribs., Inc. v. New York Post Co., 152 F.R.D. 36, 39 (S.D.N.Y. 1993) ("The strongest case for granting a stay is where a party under criminal indictment is required to defend a civil proceeding involving the same matter."). Indeed, pre-

indictment requests for a stay of civil proceedings are generally denied. See United States Commodity Futures Trading Comm. v. A.S. Templeton Group, Inc., 297 F. Supp. 2d 531, 534 (E.D.N.Y. 2003); In re Anicom Inc. Sec. Litig., No. 00 C 4391, 2002 WL 31496212, at *2 (N.D. Ill. Nov. 8, 2002) (denying stay of proceedings where defendants faced only a threat of indictment). Even after a criminal indictment has been filed, courts are split as to the propriety of issuing a stay. Compare Boesky, 660 F. Supp. at 1496-1500 (declining to stay civil proceedings where defendant under indictment); Paine, Webber, Jackson & Curtis, Inc. v. Malone S. Andrus, Inc., 486 F. Supp. 1118, 1119 (S.D.N.Y. 1980) (declining to enter stay where defendant under indictment); with In re Worldcom, 2002 WL 31729501, at *4 (granting stay where defendants were under indictment and where stay requested by district attorney).

3. Interests of the Plaintiffs

Plaintiffs clearly have an interest in the prompt resolution of their claims and in obtaining discovery while information is still fresh in witnesses' minds. Moreover, if only the criminal proceeding is allowed to proceed, the defendants' resources may be exhausted or the defendants may ultimately be jailed or heavily fined, thereby reducing the total recovery or possibility for settlement in the securities fraud class action. See In re Worldcom, 2002 WL 31729501, at *5. Further, plaintiffs could argue that a stay will diminish their ability to obtain adverse inferences from a defendants' invocation of the Fifth Amendment privilege. In re CFS, 256 F. Supp. 2d at 1239 (denying stay and noting "Plaintiffs are entitled to preserve the fact that they were deprived of information from the most central figure in the civil proceedings").

Alternatively, it could be argued that allowing the criminal action to be resolved prior to the civil action will narrow the issues to be litigated, thereby reducing the cost of litigating the

civil action. See SEC v. Mersky, No. Civ. A. 93-5200, 1994 WL 22305, at *3 (E.D. Pa. Jan. 25, 1994).

4. Interests of The Defendants

Absent a stay, defendants risk self-incrimination if they choose to defend in the civil action, or receiving an adverse inference if they instead invoke their Fifth Amendment privilege. In re CFS, 256 F. Supp. 2d at 1239; SEC v. HealthSouth Corp., 261 F. Supp. 2d 1298, 1316 (N.D. Ala. 2003) (granting stay of civil proceedings against former CEO Scrushy noting defendant should not be "placed in the precarious position of either waiving his Fifth Amendment rights" or asserting the privilege and losing the civil proceeding). Defendants also may argue a financial burden in defending both the civil action and criminal case simultaneously.

5. Interests of the Courts

Similar to the plaintiffs, courts also have a strong interest in advancing litigation and preventing unnecessary delay. This interest is seen as even stronger in the realm of complex securities fraud cases and in situations where the securities fraud class action has been pending for several years. See In re CFS, 256 F. Supp. 2d at 1239 (denying stay of civil proceedings where securities litigation was pending since 1999); In re Gaming Lottery Sec. Litig., No. 96 CIV 5567, 2000 WL 322951, at *1 (S.D.N.Y. Mar. 28, 2000) (denying stay where securities fraud class action pending for four years and discovery already completed).

Moreover, where the conclusion of the criminal proceedings is uncertain, the court's interest weighs stronger in declining to stay the civil action. See In re Worldcom, 2002 WL 31729501, at *8 ("Of greater significance to judicial efficiency is the uncertainty as to when the criminal proceedings will conclude.").

6. Interest of the Public

The public has a strong interest in the prompt resolution of civil cases as well as the prosecution of criminal cases. See In re CFS, 256 F. Supp. 2d at 1242. One significant factor in determining the public interest is whether the United States Attorney has requested or joined in the request for staying the civil proceeding. For example, in In re Worldcom, the United States Attorney not only requested the stay but argued that the civil stay would (1) prevent discovery in the civil case from being used to circumvent discovery in the criminal case; (2) encourage witness cooperation in criminal proceedings; and (3) preserve defendants' assets as a source of payment of potential restitution orders. See In re Worldcom, 2002 WL 31729501, at *8-9. Conversely, where the United States Attorney has not joined in the request for the stay, the public's interest generally weighs against granting the stay. See id. at *9 (denying stay for underwriter and director defendants where United States Attorney did not join in request for stay for such defendants); In re CFS, 256 F. Supp. 2d at 1242 (denying request for stay noting United States Attorney did no join in the request to stay discovery).

B. Alternatives to Staying the Civil Proceeding

In addition to seeking a stay of the entire civil proceeding, defendants may utilize other methods to preserve their Fifth Amendment rights without impeding the rights of plaintiffs to a speedy resolution of their securities fraud class action. The court in In re CFS suggested several methods less drastic than a complete stay of the civil proceedings including (1) sealing answers to interrogatories; (2) sealing answers to depositions; (3) imposing protective orders; (4) imposing a stay for only a finite period of time; (5) limiting a stay to a particular subject; or (6) limiting disclosure to only counsel. In re CFS, 256 F. Supp. 2d at 1240; see also SEC v.

Dresser Indus., 628 F.2d 1368, 1375 (D.C. Cir. 1980) (court may impose protective orders or postpone civil discovery). Indeed, the court in In re CFS found that a more "sensible option" than staying discovery for a defendant facing parallel criminal proceedings was to simply seal that defendant's deposition in the civil proceedings and direct that it not be used for any purpose outside the civil action except for impeachment or perjury. In re CFS, 256 F. Supp. 2d at 1240.

CONCLUSION

Inevitably, in cases involving parallel civil and criminal lawsuits, tension will arise between plaintiffs' rights to a just and timely adjudication of their claims and defendants' rights to refuse to answer under the Fifth Amendment. Defense counsel have an obvious interest in protecting their clients by encouraging the use of the Fifth Amendment privilege or requesting that criminal cases be resolved before any parallel civil cases are allowed to proceed. On the other hand, putting a shareholder lawsuit on the back burner in favor of resolving a criminal proceeding may damage the strength of the civil lawsuit. The more time that goes by, the greater the likelihood that memories will fade and documents will be misplaced or destroyed, making the shareholders' case weaker with each passing minute. Moreover, while a successful criminal prosecution will more likely result in a successful civil action, if the defendant is acquitted in a criminal case, then a civil case could be even harder to win. In any event, in light of the massive financial frauds such as Enron, WorldCom and HealthSouth, it is likely that the use of the Fifth Amendment privilege in civil proceedings will only become more prevalent.