PARALLEL PROCEEDINGS AND THE FIFTH AMENDMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. PARALLEL PROCEEDINGS AND THE 5TH AMENDMENT 1

- **A. 5th Amendment to the United States Constitution..** 1
- **B. Parallel Proceedings** 1
- **C. 5th Amendment Anecdotes** 1
- **D. Pre-suit 5th Amendment Concerns in Securities Litigation** 2
- **E. Consequences of 5th Amendment Invocation for the Civil Defendant** 3
  - **1. Adverse Inferences** 3
  - **2. Preclusion of Testimony** 4
  - **3. Timing Consequences** 5
- **F. Waiver of 5th Amendment Privilege and Its Impact on the Civil Litigation** 6
- **G. Issues Specific to 5th Amendment Invocation on Civil Litigation in Texas State Court** 6

II. STAYS IN CIVIL PROCEEDINGS 6

- **A. Authority for Granting Stays and Related Orders** 6
- **B. Conflicts Between Civil and Criminal Litigation Create Reasons for Stays** 7
- **C. Parties Can Stipulate to a Stay** 7
- **D. Factors Considered by Courts** 7
- **E. Timing Considerations** 9
- **F. Stays in the *Enron* Litigation** 9
- **G. Protective Orders Under the Federal and Texas Rules of Civil Procedure** 9

TABLE OF AUTHORITIES

CASES

ACLI Int'l Commodity Serv., Inc. v. Banque Populaire Suisse, 110 F.R.D. 278 (S.D.N.Y. 1986)........ 1
Arden Way Assoc. v. Boesky, 660 F. Supp. 1494 (S.D.N.Y. 1987)........ 8
Baxter v. Palmigiano, 425 U.S. 308 (1976)........ 3, 4
Braswell v. United States, 487 U.S. 99 (1988)........ 2
Brenner v. Commodity Futures Trading Comm., 338 F.3d 713 (7th Cir. 2003)........ 4
Campbell v. Eastland, 307 F.2d 478 (5th Cir. 1962)........ 7
Connecticut General Life Ins. v. New Images of Beverly Hills, 60 Fed.Appx. 87 (9th Cir. 2003)........ 5
Curtis v. M & S Petroleum, Inc., 174 F.3d 661 (5th Cir. 1999)........ 3
Duffy v. Currier, 291 F. Supp. 810 (D. Minn. 1968)........ 4
Fisher v. United States, 425 U.S. 391 (1976)........ 1
Gen. Tire, Inc. v. Kepple, 970 S.W.2d 520 (Tex. 1998)........ 10
Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc. 87 F.R.D. 53 (E.D. Pa. 1980)........ 8
Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553 (1st Cir. 1989)........ 5
Haring v. Prosise, 462 U.S. 306 (1983)........ 7
Heller Healthcare Fin., Inc. v. Boyes, No. Civ.A. 300CV1335D, 2002 WL 1558337 (N.D. Tex. July 15, 2002)........ 8
Hoffman v. United States, 341 U.S. 479 (1951)........ 1
In re Anicom Inc. Securities Litigation, No. 00 C 4391, 2002 WL 31496212 (N.D. Ill. November 8, 2002)........ 8
In re Edmond, 934 F.2d 1304 (4th Cir. 1991)........ 5
In re Eisenberg, 654 F.2d 1107 (5th Cir. 1981)........ 7
In re Enron Corp. Securities Derivative & "ERISA" Litigation, No. H-01-3913, H-03-2255, 2006 WL 2795321 (S.D. Tex. Sept. 27, 2006)........ 9
In re Grand Jury Subpoena, 836 F.2d 1468 (4th Cir. 1988)........ 10
In re High Fructose Corn Syrup Antitrust Litigation, 295 F.3d 651 (7th Cir. 2002)........ 3, 4
Kastigar v. United States, 406 U.S. 441 (1972)........ 1
Klein v. Harris, 667 F.2d 274 (2d Cir. 1981)........ 6
Lozano v. Lozano, 983 S.W.2d 787 (Tex. App.—Houston [14th Dist.] 1998, *aff'd in part, rev'd in part on other grounds,* 52 S.W.3d 141 (Tex. 2001)........ 3
N. River Ins. Co. v. Stefanou, 831 F.2d 484 (4th Cir. 1987)........ 1, 2
Nat'l Acceptance Co. of Am. v. Bathalter, 705 F.2d 924 (7th Cir. 1983)........ 3
Nichols v. Collins, 802 F. Supp. 66 (S.D. Tex. 1992), *aff'd in part, rev' d in part on other grounds,* 69 F.3d 1255 (5th Cir. 1995)........ 6
Ohio v. Reiner, 532 U.S. 17 (2001)........ 1
Rogers v. United States, 340 U.S. 367 (1951)........ 6
SEC v. Cymaticolor Corp., 106 F.R.D. 545 (S.D.N.Y. 1985)........ 3
SEC v. Dresser Indus., Inc., 628 F.2d 1368 (D.C. Cir. 1980)........ 7
SEC v. Graystone Nash, Inc., 25 F.3d 187 (3d Cir. 1994)........ 5
SEC v. Leach, 156 F. Supp. 2d 491 (E.D. Pa. 2001)........ 1
Tex. Dep't of Pub. Safety Officers Ass'n v. Denton, 897 S.W.2d 757 (Tex. 1995)........ 3
Texas Capital Securities, Inc. v. Sandefer, 58 S.W.3d 760 (Tex. App.— Houston [1st Dist.] 2001, pet. denied)........ 6

Trustees of Plumbers & Pipefitters Nat'l Pension Fund v. Transworld Mech., Inc., 886 F. Supp. 1134 (S.D.N.Y. 1995) 8, 9
U.S. v. Hubbell, 530 U.S. 27 (2000) 1
U.S. v. Stringer, 521 F.3d 1189 (9th Cir. 2008) 3
U.S. v. Stringer, 408 F. Supp. 2d 1083 (D.Or. 2006) 2
United States v. $61,433.04 U.S. Currency, 818 F. Supp. 135 (E.D.N.C. 1993) 4, 5
United States v. 15 Black Ledge Drive, 897 F.2d 97 (2d Cir. 1990) 3
United States v. Kordel, 397 U.S. 1 (1970) 1, 2, 7
United States v. Parcels of Land, 903 F.2d 36 (1st Cir. 1990) 5
United States v. Talco Contractors, Inc., 153 F.R.D. 501 (W.D.N.Y. 1994) 4
United States v. Tison, 780 F.2d 1569 (11th Cir. 1986) 7
Upjohn Co. v. Freeman, 906 S.W.2d 92 (Tex. App.— Dallas 1995, no writ) 10
Volmar Distribs., Inc. v. New York Post Co., 152 F.R.D. 36 (S.D.N.Y. 1993) 8

STATUTES

18 U.S.C. § 3161(h)(8) 8
FED. R .CIV. P. 26(c) 6, 9
TEX. R. CIV. P. 192.6 9
TEX. R. CIV. P. 76a 10
TEX. R. EVID. 513(c) 6

OTHER AUTHORITIES

Christopher V. Blum, *Self-incrimination, Preclusion, Practical Effect and Prejudice to Plaintiffs: The Faulty Vision of SEC v. Graystone Nash, Inc.,* 61 BROOK. L. REV. 275 (1995) 5

I. PARALLEL PROCEEDINGS AND THE 5TH AMENDMENT

A. 5th Amendment to the United States Constitution

The 5th Amendment to the Constitution of the United States provides that no person shall be compelled in a criminal case to be a witness against himself or herself. The United States Supreme Court has held that the 5th Amendment's privilege against self-incrimination can be invoked in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory. *See Kastigar v. United States,* 406 U.S. 441, 444 (1972). As a result, 5th Amendment issues are important at all stages of civil litigation.

B. Parallel Proceedings

The term "parallel proceeding" refers to civil and criminal, administrative or judicial proceedings arising out of the same set of facts and occurring simultaneously. The complex nature of parallel proceedings requires coordination of discovery and the exercise of privileges and waivers on the part of defense attorneys. When corporations and corporate officers and directors are defendants, plaintiffs' attorneys need to be familiar with defense strategies concerning the use of 5th Amendment protections. Specifically, they need to be aware of when, how, and which defendants may properly invoke the 5th Amendment, what effect such invocation has on the civil discovery process, and how the invocation may be used by adversaries at trial. This is particularly true in securities litigation as the federal securities laws allow the government to bring simultaneous civil and criminal actions for suspected violations, and private, civil actions may be concurrently maintained.

C. 5th Amendment Anecdotes

The 5th Amendment privilege applies to acts that imply assertions of fact. *U.S. v. Hubbell*, 530 U.S. 27 (2000). In order to be testimonial, an accused's communications must itself, explicitly or implicitly, relate a factual assertion or disclose information. *Id.* The act of verifying a complaint *may* be considered testimonial and may result in a waiver of 5th Amendment privileges. A verification of an answer *could* mean a similar result, as would signed affidavits in support of motions; however, most courts hold that a *lawyer's* signing of an answer in which admissions or denials are made does not constitute a "testimonial" act of the defendant for 5th Amendment purposes. *ACLI Int'l Commodity Serv., Inc. v. Banque Populaire Suisse,* 110 F.R.D. 278, 287 (S.D.N.Y. 1986).

Failure by the defendant to invoke the 5th Amendment privilege in the civil lawsuit waives the privilege, and the statements given in the civil case may then be used against the defendant in the criminal prosecution. *United States v. Kordel,* 397 U.S. 1 (1970).

A civil defendant may invoke the privilege when answering a complaint or when responding to requests for admissions, interrogatories or deposition questions. *N. River Ins. Co. v. Stefanou,* 831 F.2d 484 (4th Cir. 1987); *SEC v. Leach,* 156 F. Supp. 2d 491, 494 (E.D. Pa. 2001). "It need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Ohio v. Reiner,* 532 U.S. 17, 20-21 (2001) (per curiam) (citing *Hoffman v. United States,* 341 U.S. 479, 486-487 (1951)). Even the act of producing documents pursuant to a subpoena may have a communicative effect for 5th Amendment purposes, though the production itself of the documents does not compel testimony. *Fisher v. United States,* 425 U.S. 391, 410 (1976).

A civil defendant may not make a blanket invocation of the 5th Amendment to avoid responding to questions or requests

contained in interrogatories, incorporated into a request for production of documents, or asked at a deposition. A general or blanket refusal to answer questions on the basis of 5th Amendment privilege will not be permitted unless each response may reasonably incriminate the respondent. *N. River Ins. Co,* 831 F.2d at 487.

A corporation is not a person and may not assert 5th Amendment privileges. *Braswell v. United States,* 487 U.S. 99 (1988). Only individuals may invoke the right against self-incrimination. When answering a pleading or discovery on behalf of a corporation, it is possible that an officer or agent of the corporation would not be able to do so without making incriminatory statements. In this situation, a corporation must appoint an agent who is able to furnish the information without fear of self-incrimination. *Kordel,* 397 U.S. 1 at 8.

D. Pre-suit 5th Amendment Concerns in Securities Litigation

Generally, evidence collected by the SEC must be kept confidential. However, federal statutes and regulations provide an exception to this rule, allowing the SEC to share investigation materials with other governmental agencies, most importantly the Department of Justice.

The practical effects of this exception is illustrated in *U.S. v. Stringer*, 408 F. Supp. 2d 1083 (D.Or. 2006). In that case, the SEC began its investigation of the defendants' alleged falsification of financial records in June 2000. At the inception of the SEC investigation, staff from both the SEC and United States Attorney's Office ("USAO") met and the SEC turned over notebooks of documents which the SEC obtained through the defendants' cooperation. Shortly thereafter, the USAO decided to commence a separate criminal investigation, and it began coordinating its efforts with the SEC. The USAO instructed the SEC on how best to conduct SEC depositions in order to create the "best possible record" to support a potential false statement criminal prosecution. The SEC even agreed to conduct the interviews in Oregon, ensuring the Portland USAO's jurisdiction over any false statements case that could arise. Despite this collaboration, the SEC failed to disclose the existence of the criminal investigation to the defendants until February 2003. At no time prior to the eventual disclosure were the defendants notified that they were the target of any ongoing criminal investigation.

Instead, the SEC and USAO took steps to conceal the existence of the criminal investigation. The USAO decided it would not get involved in the SEC investigation so as not to "impede" it, and the SEC instructed court reporters at the depositions not to disclose the existence of the criminal investigation to the defendants.

The grand jury issued indictments charging the defendants in 2004. Soon after, armed with the information discussed above, the defendants moved to dismiss their criminal indictments or, in the alternative, to suppress the statements made to the SEC. The defendants argued that the SEC and USAO worked together on a single investigation, with the latter hiding behind the SEC in order to deprive the defendants of their 5th Amendment rights. The defendants claimed that if they had been informed of the criminal investigation, they would have sought a stay of the civil proceedings, not produced documents and would have considered exercising their 5th Amendment right. Ultimately, the district court concluded that "a government agency may not develop a criminal investigation under the auspices of a civil investigation [because] it would be a flagrant disregard of individuals' rights to deliberately deceive, or even lull someone into incriminating themselves in the civil context when activities of an obvious criminal nature are under investigation." The district court granted the defendants' motion on the ground that the government had violated the defendants' due process rights by deceitfully

pursuing simultaneous civil and criminal investigations.

The United States Court of Appeals for the Ninth Circuit, however, disagreed. 521 F.3d 1189 (9th Cir. 2008). The Ninth Circuit focused on the clause in the standard witness form given by the SEC in connection with its requests for production. This form disclosed that information obtained by the SEC is "often" made available "to other governmental agencies, particularly the United States Attorneys and state prosecutors." The form also stated that "[t]here … is a likelihood that information supplied by you will be made available to such agencies where appropriate." With regard to the 5th Amendment right against self-incrimination, that form advised that:

> Information you give may be used against you in any federal . . . civil or criminal proceeding . . . . You may refuse, in accordance with the rights guaranteed to you by the Fifth Amendment . . . to give any information that may tend to incriminate you . . . .

The SEC also warned defendants at the start of each deposition that "the facts developed in this investigation might constitute violations of . . . criminal laws." The Ninth Circuit held that these disclosures discredited defendants' assertion that they were deceived regarding the risks that information they were providing voluntarily to the SEC might be used in a parallel criminal proceeding against them.

The Ninth Circuit's decision will likely encourage further cooperation between prosecutors and the SEC to gain strategic and tactical advantages against investigation targets. As a result, this decision underscores the need for counsel to completely evaluate the risks of criminal liability by weighing the pros and cons of cooperation between the SEC and their clients.

E. Consequences of 5th Amendment Invocation for the Civil Defendant

Invoking the 5th Amendment may at times be disadvantageous for a defendant and, consequently, advantageous for a civil plaintiff or adversary. For example, if the 5th Amendment privilege is invoked to prevent pre-trial discovery, the court may refuse to allow the defendant to present certain evidence at trial. *Nat'l Acceptance Co. of Am. v. Bathalter,* 705 F.2d 924 (7th Cir. 1983); *SEC v. Cymaticolor Corp.,* 106 F.R.D. 545 (S.D.N.Y. 1985).

1. Adverse Inferences

A negative or adverse inference can be made by the jury if a defendant asserts his 5th Amendment privilege. *Baxter v. Palmigiano,* 425 U.S. 308, 318 (1976) (the prevailing rule of the 5th Amendment "does not forbid . . . adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them . . . ."); *United States v. 15 Black Ledge Drive,* 897 F.2d 97 (2d Cir. 1990); *Curtis v. M & S Petroleum, Inc.,* 174 F.3d 661, 673-74 (5th Cir. 1999)(where the agent the corporation appointed to respond to discovery request invoked his personal 5th Amendment privilege, plaintiffs were entitled, after Rule 403 balancing, to an instruction permitting jury to draw an adverse inference from agent's refusal to testify); *Tex. Dep't of Pub. Safety Officers Ass'n v. Denton,* 897 S.W.2d 757, 763 (Tex. 1995); *Lozano v. Lozano,* 983 S.W.2d 787, 791 (Tex. App.—Houston [14th Dist.] 1998, *aff'd in part, rev'd in part on other grounds,* 52 S.W.3d 141 (Tex. 2001)) (refusal to answer questions by asserting the privilege is relevant evidence from which the finder of fact in a civil action may draw whatever inference is reasonable under the circumstances).

An example of an adverse inference resulting from the 5th Amendment invocation is the case of *In re High Fructose Corn Syrup Antitrust Litigation,* 295 F.3d 651 (7th Cir. 2002), involving allegations of

price fixing violations under the Sherman Act. A vice president and other officers of one of the defendants refused to answer questions in depositions on 5th Amendment grounds. These witnesses had already been convicted and sentenced in a different price fixing case. The plaintiffs deposed the witnesses and asked them if they had fixed prices in this case as well. In granting defendants' motion for summary judgment, the district court ruled the statements inadmissible and said that no inference could be drawn from the deponents' silence. The Seventh Circuit Court of Appeals disagreed with the district court's assumption that "a person has carte blanche by virtue of the Fifth Amendment's self-incrimination clause to refuse to answer questions." *Id.* at 663. The court stated that while the deponents' answers could not be imputed to the corporation, the issue in the case was whether there was a conspiracy to fix prices, and the refusal to answer the plaintiffs' questions was one piece of evidence that tended to show this. *Id.* at 664. Citing *Baxter*, the court stated that adverse inferences may be drawn from a refusal to answer questions on 5th Amendment grounds, subject to a Rule 403 balancing test. *Id.* at 663.

The Seventh Circuit was presented with 5th Amendment issues again in the case of *Brenner v. Commodity Futures Trading Comm.,* 338 F.3d 713 (7th Cir. 2003). In that case, husband and wife plaintiffs petitioned the court to review a decision of the Commodity of Futures Trading Commission finding them liable for violations of the Commodity Exchange Act and imposing sanctions. Beginning in 1986 and continuing through 2000, plaintiff Steven Brenner repeatedly violated orders from the Commission which eventually placed him on a 10-year trading ban on the domestic futures market. During this same time period, the U.S. Department of Justice pursued the criminal prosecution of Brenner for disobeying a lawful order of the court. Brenner pled guilty to trading in violation of the court order and received a sentence of two-years probation. When the Commission issued another complaint against Brenner in March of 2000, which included allegations against his wife for aiding and abetting Brenner's continued illegal trading, the plaintiffs failed to respond to the complaint. The ALJ assigned to the case ordered the plaintiffs to show cause as to why a default judgment should not be entered. Instead, the plaintiffs asserted privileges as the basis for refusing to admit or deny the allegations in the complaint, including invoking the 5th Amendment. The Commission's Division of Enforcement later served plaintiffs with requests for admissions to which the plaintiffs also asserted the same privileges as the basis for refusing to respond. The Division moved for summary disposition, and in support thereof requested the ALJ to draw adverse inferences from the plaintiffs' failure to answer the allegations in the complaint or to respond to the discovery requests. The ALJ found against the plaintiffs and ordered sanctions. The Commission affirmed the ALJ's decision, and the plaintiffs appealed. The Seventh Circuit also affirmed, holding that "[T]hough we take the evidence in a light most favorable to the [plaintiffs], we believe that the evidence offered by the Division, combined with the petitioner's failure to respond to that evidence by invoking various privileges, is sufficient to support the findings of liability made by the Commission." This holding suggests that adverse inferences from invoking the 5th Amendment when combined with other probative evidence are sufficient to support motions for summary disposition or summary judgment.

2. Preclusion of Testimony

Another possible consequence for a defendant who invokes the 5th Amendment during pre-trial discovery is that he may be precluded from any testimony. *Duffy v. Currier,* 291 F. Supp. 810, 815 (D. Minn. 1968); *United States v. Talco Contractors, Inc.,* 153 F.R.D. 501 (W.D.N.Y. 1994); *United States v. $61,433.04 U.S. Currency,*

818 F. Supp. 135 (E.D.N.C. 1993). The Ninth Circuit's decision, *Connecticut General Life Ins. v. New Images of Beverly Hills,* 60 Fed.Appx. 87 (9th Cir. 2003), illustrates that consequence. In that case, the insurer brought an action against a clinic and physician (Ezeckiel Zilka) for violations of RICO statutes. The district court granted summary judgment in favor of the insurer. The Ninth Circuit held that the district court did not abuse its discretion in considering the 5th Amendment invocations of Zilka and his co-defendants as summary judgment evidence. The court stated that the district court was entitled to draw adverse inferences against Zilka, regardless of what his co-defendants elected to do. The court further held that having invoked the 5th Amendment during discovery, Zilka could not then testify to dispute the plaintiff's evidence or to support his version of the facts. Thus, Zilka was not able to create a genuine issue of fact with his own declaration to defeat plaintiff's motion for summary judgment. *Id.* at 89.

But s*ee, e.g., SEC v. Graystone Nash, Inc.,* 25 F.3d 187 (3d Cir. 1994). In *Graystone*, the Third Circuit Court of Appeals considered whether such consequence was appropriate. In this case, the defendants were principals in a massive securities fraud operation. During discovery, defendants invoked 5th Amendment privileges as their sole response to every substantive request. After the close of discovery, the district court granted the SEC's motion to preclude the defendants from offering any factual support from any source for their denials and defenses in light of the prejudice to the SEC stemming from the total avoidance of discovery. The court then reviewed the evidence and granted summary judgment in favor of the SEC. On appeal, the Third Circuit Court of Appeals held that such a preclusion order was an inappropriate sanction since it rendered the exercise of the privilege too "costly" in contravention of the 5th Amendment. *Id.* at 190-191. The court drew this conclusion from its finding that the practical effect of a total preclusion order is equal to that of an entry of judgment for the opposing party. *Id*. The court then outlined factors that the district court should consider on remand when selecting a more appropriate remedy. *Id.* at 193-194. Critics of this holding believe that the Third Circuit Court of Appeals underestimated the prejudice accruing to plaintiffs faced with a total avoidance of discovery. In essence, critics believe that the Third Circuit Court of Appeals, in balancing the burden placed on the right to invoke the self-incrimination privilege against the prejudice to the opposing party, gave civil defendants a license to prejudice plaintiffs in every civil case. *See* Christopher V. Blum, *Self-incrimination, Preclusion, Practical Effect and Prejudice to Plaintiffs: The Faulty Vision of SEC v. Graystone Nash, Inc.,* 61 BROOK. L. REV. 275 (1995).

3. <u>Consequences Resulting From Timing</u>

There are also potential consequences related to the timing of the defendant's invocation of 5th Amendment privileges and subsequent decision to waive such privileges. When a civil defendant invokes 5th Amendment privileges during discovery, but on the eve of trial changes his mind and decides to waive the privilege, the belated waiver of privilege is obviously unfair to the plaintiffs. At that stage in the civil proceeding, the plaintiffs would have conducted discovery and prepared their case without the benefit of the defendant's testimony. In *Gutierrez-Rodriguez v. Cartagena,* 882 F.2d 553 (1st Cir. 1989), the First Circuit Court of Appeals held that a defendant may not use the 5th Amendment to shield herself from the opposition's inquiries during discovery only to impale her accusers with surprise testimony at trial. *Id.* at 577. Similarly, the Courts of Appeals in *In re Edmond,* 934 F.2d 1304, 1308-09 (4th Cir. 1991) and *United States v. Parcels of Land,* 903 F.2d 36, 43 (1st Cir. 1990), sustained the orders of district courts striking defendants' affidavits offered in opposition of plaintiffs' summary judgment motions after defendants

had refused to answer questions at their depositions on 5th Amendment grounds.

F. Waiver of 5th Amendment Privilege and Its Impact on the Civil Litigation

If a corporate officer or director is subpoenaed to testify at a deposition while under indictment and testifies as to matters covered in the indictment without invoking the 5th Amendment, he has most likely waived his privilege. In *Rogers v. United States,* 340 U.S. 367 (1951), the Court held that if a witness waives the privilege by disclosing an incriminating fact, he also waives the privilege as to the details of the fact or matter disclosed, and he then must fully disclose those details. This required disclosure is not without limitation. For each additional question asked, the witness is entitled to ask the court to determine whether an additional response will further incriminate him (*i.e.*, the court must determine whether disclosure of a particular detail will necessarily or potentially furnish an additional link in the chain of evidence necessary to prosecute the witness).

A court may also decide that a 5th Amendment waiver is *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 earlier statements would be interpreted as a waiver of the 5th Amendment. *Klein v. Harris,* 667 F.2d 274, 287-288 (2d Cir. 1981).

The courts must look only to the witness' statements in that particular proceeding to determine whether the privilege is waived. A witness' testimony is a prior proceeding or other disclosure of incriminating facts does not amount to a *perpetual* waiver of the 5th Amendment rights of privilege. *Nichols v. Collins*, 802 F. Supp. 66 (S.D. Tex. 1992), *aff'd in part, rev' d in part on other grounds,* 69 F.3d 1255 (5th Cir. 1995).

G. Issues Specific to 5th Amendment Invocation on Civil Litigation in Texas State Court

Rule 513 of the Texas Rules of Evidence, entitled *Comment Upon or Inference from Claim of Privilege; Instruction,* provides that the civil defendant who asserts a 5th Amendment privilege can be compelled to do so in front of the jury. *See* TEX. R. EVID. 513(c). This rule has no counterpart in the Federal Rules of Evidence or the Uniform Rules of Evidence. The intent of the rule is to allow a party to require his opponent to invoke the 5th Amendment before the trier of fact.

In *Texas Capital Securities, Inc. v. Sandefer,* 58 S.W.3d 760 (Tex. App.— Houston [1st Dist.] 2001, pet. denied), the plaintiffs sued Texas Capital Securities and other defendants for making fraudulent representations and inducing plaintiffs to make substantial and unsuccessful investments. A jury found Texas Capital and Ballow, a stock promoter, jointly and severally liable and awarded actual and punitive damages. In one of its grounds for appeal, Texas Capital claimed that it was unfairly prejudiced by the trial court's decision to admit the videotaped deposition of Ballow. Ballow invoked the 5th Amendment in response to every question except when asked for his name and address. The court held that the jury was entitled to view the videotaped deposition, observe Ballow invoking the 5th Amendment in response to questions asked, and draw an adverse inference against him accordingly.

II. STAYS IN CIVIL PROCEEDINGS

A. Authority for Granting Stays and Related Orders

In Federal Court, the civil 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). This order may be for a stay of the civil matter or a protective order related to matters obtained

during the civil discovery process. Whether a stay of the civil proceeding is appropriate depends upon the "particular circumstances of the case." *Kordel,* 397 U.S. 1 at 12 n. 27.

B. Conflicts Between Civil and Criminal Litigation Create Reasons for Stays

Because criminal discovery is much narrower in scope than civil discovery, there is a strong temptation for prosecutors and criminal defense attorneys to use the civil discovery process to obtain information that might be helpful in the criminal case. In *Campbell v. Eastland,* 307 F.2d 478, 487 (5th Cir. 1962), the court held that a "litigant should not be allowed to make use of the liberal discovery procedures applicable to a civil suit as a dodge to avoid the restrictions on criminal discovery and thereby obtain documents he would not otherwise be entitled to for use in his criminal suit." Likewise, in the case of *In re Eisenberg,* 654 F.2d 1107, 1113-14 (5th Cir. 1981), the court noted that "*Campbell* held that liberal discovery procedures were not a 'back door to information otherwise beyond reach under the criminal discovery rules'" and classified the plaintiff's attempts to depose a witness under FED. R. CIV. P. 27 as a disguised attempt at criminal discovery.

In *United States v. Tison,* 780 F.2d 1569, 1572 (11th Cir. 1986), the court held it improper for the defendant to file a civil suit to generate discovery for a criminal case and stayed the civil proceeding for three years in order to prevent the defendant from circumventing the criminal discovery provisions.

Government agencies are frequently given a stay of their civil matter when the facts of the civil action are inextricably interwoven with those of the criminal prosecution. *Campbell,* 307 F.2d at 488.

The defendant seeking a stay will most likely argue that requiring him to respond to discovery will unfairly intrude upon his 5th Amendment rights against self-incrimination, or will prevent him from offering a defense to the civil case. *SEC v. Dresser Indus., Inc.,* 628 F.2d 1368, 1375-1376 (D.C. Cir. 1980). As noted previously, the defendant may argue that since the scope of civil discovery is much broader than criminal discovery, and since prosecutors, government regulators, and plaintiffs' attorneys often collaborate and exchange information, the lack of a stay may mean that the prosecutor will obtain discovery to which he would not ordinarily be entitled in the criminal case.

C. Parties Can Stipulate to a Stay

It is possible for parties to enter into a stipulation for a stay. The plaintiff might consider agreeing to a stay if a criminal conviction would entitle the plaintiff to summary judgment on the issue of liability in the civil case. *Haring v. Prosise,* 462 U.S. 306 (1983). In so doing, the plaintiff would save on costs resulting from discovery and litigation of liability. The provisions of the Speedy Trial Act further work to ensure that the criminal case will not endlessly drag to the prejudice of plaintiff's claims. *Dresser Indus., Inc.,* 628 F.2d at 1377. In cases with multiple or class-action plaintiffs, however, a stay of the civil proceedings might lead to the conundrum that plaintiffs' potential recovery will be consumed by the defendants' costs to litigate the criminal lawsuit.

D. Factors Considered by Courts

To determine whether a stay should be granted, courts generally conduct a balancing test using the following factors:

1. the private interests of the plaintiff in proceeding expeditiously with the civil litigation (weighed against the prejudice caused by delay);

2. the private interests of and burden on the defendant;

3. the convenience of the courts;

4. the interests of persons not parties to the civil litigation; and

5. the public's interest.

Arden Way Assoc. v. Boesky, 660 F. Supp. 1494, 1496-1497 (S.D.N.Y. 1987); *Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc.,* 87 F.R.D. 53, 56 (E.D. Pa. 1980).

Other jurisdictions have added the following factors to those listed above when determining whether circumstances warrant a stay: (1) the extent to which the issues in the criminal case overlap with those presented in the civil case; and (2) the status of the criminal case, including whether the defendants have been indicted. *See Trustees of Plumbers & Pipefitters Nat'l Pension Fund v. Transworld Mech., Inc.,* 886 F. Supp. 1134, 1139 (S.D.N.Y. 1995) (citing *Parallel Civil & Criminal Proceedings,* 129 F.R.D. 201, 201-203 (Pollack, J.) ("Parallel Proceedings")); *Volmar Distribs., Inc. v. New York Post Co.,* 152 F.R.D. 36, 39 (S.D.N.Y. 1993).

Plaintiffs clearly want the swiftest results possible, especially when parallel criminal proceedings are involved. If the criminal proceeding concludes first, and the defendant is jailed or heavily fined, a civil recovery may be speculative. Also, the complex nature of parallel proceedings usually means that the defendant has to hire many lawyers, experts, and other advisors. This means additional expenses for the defendant which further reduces the resources from which a plaintiff may recover a judgment. Thus, delay in the civil proceeding may not be in the plaintiff's best interest. *In re Anicom Inc. Securities Litigation*, No. 00 C 4391, 2002 WL 31496212 (N.D. Ill. November 8, 2002)(denying the defendants' request to stay, concluding, among other things, that a stay would be prejudicial to the plaintiff because of defendants' failure to seek a stay sooner and the risk that the defendants would be depleting insurance monies that could be used in the civil action).

When financial factors are not present, the prejudice to the plaintiff from a civil discovery stay should be minimal. The normal speed of criminal and civil proceedings means that stays should usually be acceptable. Under the Speedy Trial Act, most criminal proceedings must be concluded within a matter of months. And since civil litigation rarely concludes in less than one to two years, a delay of a few months rarely will impose serious prejudice on the plaintiff. *Heller Healthcare Fin., Inc. v. Boyes,* No. Civ.A. 300CV1335D, 2002 WL 1558337 (N.D. Tex. July 15, 2002)(granting a stay of the civil proceedings until conviction and sentencing or acquittal, reasoning that the burden on plaintiff would be minimal if the stay was granted only through acquittal or sentencing, as opposed to it lasting throughout the duration of the direct appeal if defendant is convicted). If the criminal case is determined by the court to be "complex," however, the deadlines of the Speedy Trial Act are waived, causing the proceedings to last longer. Courts have the discretion to grant continuances when the proceedings are determined to be complex in nature. *See* 18 U.S.C. § 3161(h)(8).

Without a stay, the defendant in a civil proceeding will most likely invoke the 5th Amendment, an act which may be used against him at trial. Also, the discovery taken in the civil case may provide additional information to the prosecution for its use in the criminal case.

The court's interests in a stay stem from docket congestion. The reality is that oftentimes the pendency of a criminal case will speed up the civil case by encouraging a settlement. If the defendant pleads guilty to, or is found guilty of, charges arising out of the same transaction which is at the center of the civil case, the reasons for settlement may be obvious. Likewise, an acquittal can also speed along the civil case.

E. Timing Considerations

As for the timing involved in requesting a stay, courts are more likely to consider granting a stay after the defendant has been indicted, but before trial, plea agreement, or sentencing. When the defendant is not yet under indictment, the chances of the court granting a stay are slight. A stay is most appropriate after indictment because (1) the likelihood that a defendant may make incriminating statements is greatest after an indictment has issued, and (2) the prejudice to the plaintiffs in the civil case is reduced since the criminal case will likely be quickly resolved due to Speedy Trial Act considerations. *Trustees,* 886 F. Supp. at 1139. Likewise, if a defendant has been granted immunity, there is little chance of a stay.

F. Stays in the *Enron* Litigation

The *Enron* class action provides examples of the use of stay. On September 6, 2003, Judge Melinda Harmon of the U.S. District Court for the Southern District of Texas, granted motions to postpone civil discovery and to stay answers during the pendency of the criminal proceedings against Michael J. Kopper and David Duncan. Both defendants had already pled guilty and were awaiting sentencing. The defendants asserted that they still need to protect their 5th Amendment rights until they have been sentenced. The court agreed, citing cases that speak of the possible impact that compelled testimony could have on the defendants' undetermined sentences. Judge Harmon also noted that both defendants had entered into agreements to cooperate with the government's ongoing investigation, and that participating in the civil discovery might interfere with that investigation. The court had previously granted a similar request from defendant Andrew Fastow.

On September 27, 2006, Judge Harmon denied defendant Jeffrey Skilling's request to extend the stay of litigation previously granted by the court until his criminal conviction was on final appeal. No. H-01-3913, H-03-2255, 2006 WL 2795321 (S.D. Tex. Sept. 27, 2006). Judge Harmon considered eight factors which include those listed above, as well as: (1) the nature of the proceedings; (2) how and when the 5th Amendment is invoked and a stay of the civil proceedings requested; and (3) the status of the case. Judge Harmon noted that the civil litigation had already been pending for five years and was at a "late stage", resulting in an increased financial hardship to plaintiffs. She concluded that further delay would only add to the plaintiffs' prejudice.

G. Protective Orders Under the Federal and Texas Rules of Civil Procedure

In contrast to a stay of the litigation, a defendant may seek a protective order under the Federal Rules of Civil Procedure or the Texas Rules of Civil Procedure. A protective order allows the lawsuit to continue, while placing restrictions or conditions which limit access to certain discovery. This order is subject to modification by the court at any time. FED. R. CIV. P. 26(c); TEX. R. CIV. P. 192.6. Courts, through a protective order, may do any of the following: (1) order that no discovery be had from the party until all other discovery is completed; (2) prioritize discovery so that the party is deposed only on matters not likely to be the subject of grand jury inquiry; (3) order that the party make a binding election regarding invocation of the 5th Amendment reasonably close to trial so that opposing parties will still have an opportunity for a pre-trial deposition (30 to 40 days should be sufficient); and/or (4) order the party to deposit documents with the clerk of the court in a sealed envelope marked "Privileged" or "5th Amendment," not to be opened without further order of the court (this would comfort opposing parties that documents which might be relevant and otherwise discoverable would not be lost or destroyed).

Under Texas Rule of Civil Procedure 192.6, a party seeking to restrict the dissemination of unfiled discovery or other documents should file a motion for a protective order. *Gen. Tire, Inc. v. Kepple,* 970 S.W.2d 520, 524-25 (Tex. 1998). It is not required that the party invoke the provisions of Rule 76a when filing the motion for protective order. *See* TEX. R. CIV. P. 76a (Sealing Court Records). The burden is on the party opposing the request to show that the documents at issue are "court records" as defined in Rule 76a and subject to the presumption of openness. *Kepple,* 970 S.W.2d at 525; *Upjohn Co. v. Freeman,* 906 S.W.2d 92, 96 (Tex. App.— Dallas 1995, no writ).

In certain circumstances, however, a protective order may have little value to the defendant, since courts have held that a federal grand jury subpoena takes precedence over a civil protective order that was originally granted to protect civil depositions from prosecutors. *See In re Grand Jury Subpoena,* 836 F.2d 1468 (4th Cir. 1988).

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