

Once Assured, An SEC Stay As DOJ Acts Is No Longer A Lock

By **Stewart Bishop**

Law360, New York (October 31, 2016, 5:08 PM EDT) -- The stay of a U.S. Securities and Exchange Commission enforcement action while a related criminal proceeding plays out was long considered to be a given in parallel cases, but some judges are increasingly eschewing blanket civil discovery stays, a welcome shift for many in the defense bar.

U.S. District Judge Louis L. Stanton in New York recently rebuffed Manhattan U.S. Attorney Preet Bharara's bid to stay the SEC's case against prominent sports bettor William "Billy" Walters and a former Dean Foods Co. board member over an insider trading scheme tied to pro golfer Phil Mickelson, dismissing claims of prejudice to the parallel criminal case.

In Boston, U.S. District Judge Allison D. Burroughs has also shown signs that the days of the government getting an automatic stay of civil litigation until the conclusion of a criminal case are over. In a December ruling over a stay bid in an insider trading case against a Boston real estate investor, Judge Burroughs held that the prospect of a criminal defendant getting access to information via civil discovery that would be helpful in the defense of their criminal case isn't enough, by itself, to warrant a stay of a parallel civil action.

White collar litigator and former Manhattan federal prosecutor David I. Miller of Morgan Lewis & Bockius LLP said the uptick in SEC enforcement actions has brought with it more pressure from defense attorneys to allow civil discovery to proceed while a parallel criminal action goes forward, and courts are recognizing more frequently that there can be some limited civil discovery in the parallel civil case without substantially harming the government's criminal action.

"So while before courts might have been predisposed to just take the government's argument that it would substantially undermine the criminal prosecution if any civil discovery was to proceed, recently courts have been more likely to scrutinize the government's arguments and try to come up with some level of compromise," Miller said.

A decade ago, judges would almost never allow the civil action to proceed simultaneously with the criminal case, said white collar attorney Roberto Braceras of Goodwin Procter LLP, a former prosecutor for the fraud section of the U.S. Department of Justice's Criminal Division, but jurists like Judge Burroughs and U.S. District Judge Jed Rakoff have led the way in finding that in many instances it's appropriate to have some discovery proceed in a civil action while the related criminal matter proceeds.

Braceras said this has been an interest of the white collar defense bar for years, which has chafed at the

SEC announcing its case with much fanfare on the same day an indictment is returned in a related criminal case by the DOJ, which almost immediately steps in and moves to stay the SEC action.

In these cases, particularly in insider trading cases, Braceras said the SEC wants to “have your cake and eat it too,” filing the complaint, getting the press attention and notching a stat but then moving to stay the action.

“I think some judges are starting to see that there’s something unnecessary about the SEC filing a complaint, and in coordination with the Department of Justice, the Department of Justice seeks to stay the litigation,” Braceras said. “And some judges are saying you shouldn’t have it both ways.”

The potential advantage for defendants in going forward with civil discovery while the criminal action proceeds can be significant.

“The advantage is that the defense can get to depose all of the key people who could be witnesses in the government’s criminal case, which is a huge advantage for any lawyer representing that defendant in a criminal case down the road,” said Robert A. Mintz, the chair of the government investigations and white collar group at McCarter & English LLP and a former federal prosecutor.

The government often contends this leads to one-sided discovery. In the Dean Foods case, an attorney for Bharara’s office said Walters has invoked his Fifth Amendment rights, yet he would have the opportunity to depose witnesses in the civil action absent a stay, while the SEC would have little recourse until the criminal matter is decided.

Mintz said the invocation of the Fifth Amendment in a civil case and a refusal to sit for a deposition usually results in a motion for an adverse inference to be drawn against the defendant, which can be damaging for the defense in the civil action.

“But it may be at that point, the defendant is more concerned about exploiting the civil case to get free discovery in a potential criminal prosecution and less concerned about the outcome of the civil case,” Mintz said. “There’s advantages and pitfalls on both sides, but I think ... there’s more potential harm to the government than there is to the defendant, assuming they’re more concerned about the criminal case than the civil case.”

Even assuming a defendant in a criminal action asserts Fifth Amendment protections in the civil case, some judges are increasingly amenable to workarounds, allowing other discovery to proceed before getting to the deposition of a defendant.

“What some judges have done is to say, look, why not allow as much discovery to go forward as possible before the deposition of the defendant who’s going to take the Fifth is necessary? So while it’s true that the defendant is going to take the Fifth, there’s no reason we can’t do all this other work that takes place in a civil case before we get to that deposition,” Braceras said.

Going forward, one development to watch for is the effect on co-defendants, uncharged co-conspirators or other individuals. While a defendant facing criminal charges may have a great interest in getting as much discovery as possible in the related civil case before the criminal action goes to trial, other people involved in the case may have an interest in moving to intervene and stay the civil case.

Executives and corporate insiders who are uncharged may have a strong desire to avoid a situation

where they would be advised to take the Fifth in a deposition, Braceras said.

“That’s the sort of collateral damage of defendants seeking to lift stays,” he said. “It’s not just the impact on the government’s criminal case, there’s also an impact on other individuals who may or may not be charged in a criminal case but who still have an interest in avoiding civil discovery.”

The Walters and Dean Foods cases are U.S. v. Davis et al., case number 1:16-cr-00338, and Securities and Exchange Commission v. William T. Walters et al., case number 1:16-cv-03722, both in the U.S. District Court for the Southern District of New York.

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