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Honest Services after *Skilling*: Judicial, Prosecutorial, and Legislative Responses

BY IRIS E. BENNETT, JESSIE K. LIU, CYNTHIA J. ROBERTSON, AND GOVIND C. PERSAD

In *Skilling v. United States*, the U.S. Supreme Court substantially narrowed the reach of the "honest services fraud" statute, 18 U.S.C. § 1346, by holding that it applies only to "bribery and kickback schemes," not to "undisclosed self-dealing by a public official or private employee." *Skilling v. United States*, 130 S. Ct. 2896 (2010). Two companion cases also were decided the same day. *See Black v. United States*, 130 S. Ct. 2963 (2010); *Weyhrauch v. United States*, 130 S. Ct. 2971 (2010). These decisions have major significance for federal fraud prosecutions.

Honest-Services-Fraud Law Before *Skilling*

Honest-services fraud began as an outgrowth of 18 U.S.C. §§ 1341 and 1343, which criminalize the use of the mails or wires to execute a "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretense, representations, or promises." About 60 years ago, federal prosecutors started successfully using the mail-and-wire-fraud statutes to charge fraud involving "intangible harms," which they alleged included a deprivation of the "honest services" owed by the defendant to a particular group, such as by a public official to the public. The Supreme Court's 1987 decision in *McNally v. United States*, 483 U.S. 350 (1987), temporarily halted these prosecutions by holding that the statutory term "property" did not encompass "honest services."

In 1988, Congress enacted section 1346, which expressly overruled *McNally* by adding a provision to the mail-and-wire-fraud statutes prohibiting "a scheme or artifice to defraud another of the intangible right of honest services."

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Participating in Civil Litigation Without Waiving the Fifth Amendment Privilege Against Self-Incrimination

BY SCOTT HERSHMAN, LINDSAY LEONARD, AND SEAN P. SHECTER

With the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the government now has increased power to regulate the financial-services industry and expanded jurisdiction to bring enforcement actions against individuals and corporate entities. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, H.R. 4173, 111th Cong. (2010) (enacted). The pressure to curtail and punish financial fraud coupled with the expanded regulatory authority will likely result in a greater number of parallel criminal and civil proceedings. For example, the Southern District of New York U.S. Attorney's Office filed criminal charges against Raj Rajaratnam, founder and manager of Galleon Group, accusing him of an insider-trading scheme involving Galleon's hedge funds. On the same day, the SEC filed a civil action against him, alleging violations of securities laws for insider trading.

Defendants in parallel litigation will be confronted with the choice between asserting the Fifth Amendment in the civil case and waiving the protection against self-incrimination and participating in the litigation. Neither choice is without consequences. Defendants asserting the privilege face the possibility of an adverse inference being drawn against them and the risk that the court and other parties may believe that they have something to hide. And

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Message from the Chairs

BY STACEY F. GOTTLIEB, D. GRAYSON YEARGIN, AND KENNETH C. PICKERING

This has been quite a year to be involved in the practice of criminal law. From legislation strengthening the enforcement tools used by prosecutors and government attorneys to landmark Supreme Court decisions affecting the public corruption landscape, there has been a lot of changes that warrant close attention. We are excited to continue to be a part of your practice by offering resources and analysis to keep you up to date.

Honest Services Fraud Teleconference

In September, the Criminal Litigation Committee and the Criminal Justice Section jointly sponsored a teleconference and live audio webcast titled, "The Supreme Court's Ruling on Honest Services Fraud: Where Do We Go From Here?"

The program followed the Supreme Court's decisions in *Skilling v. United States*, *Black v. United States*, and *Weyhrauch v. United States*, concerning the honest-services-fraud statute, 18 U.S.C. § 1346. The program discussed the reach and impact of those decisions and the future of honest-services-fraud prosecutions.

In those cases, the Court held that section 1346 criminalizes only schemes to defraud that involve bribes or kickbacks. The Court rejected the argument that the statute applies in non-disclosure situations such as undisclosed self-dealing by public officials or private employees.

Congratulations to moderator Richard W. Westling, and presenters Miguel A. Estrada, Thomas A. Hagemann, and Julie Rose O'Sullivan, for a successful program.

Section Annual Conference

The 2011 Section of Litigation Annual Conference will be held jointly with the Criminal Justice Section. The joint conference is scheduled to take place at the Fontainebleau Resort in Miami Beach, Florida, April 13–15, 2011.

The conference will be a terrific opportunity to catch up with other Criminal Litigation Committee members, as well as members of the Criminal Justice Section. We urge you to attend the conference and the many terrific programs and committee meetings taking place.

The Criminal Litigation Committee is planning to hold a business meeting one evening during the conference as well. You can view the agenda and register for the conference at the committee's website. We hope to see you there!

New Committee Chairs

The committee welcomes two new chairs. D. Grayson Yeargin and Kenneth C. Pickering join Stacey F. Gottlieb as the chairs of the Criminal Litigation Committee. Grayson previously served as website editor. Ken served as a member of the newsletter's editorial board. We all look forward to a fun and productive year.

Getting Involved

The Criminal Litigation Committee is only as good as its active members; including its dedicated ABA staff. We are always looking for ideas, content for our newsletter and web publications, and members willing to become actively involved. If you would like to pass along an idea or get involved, please let us know. ■

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Chairs, Criminal Litigation Committee

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Honest Services

continued from front cover

Congress left the term "honest services" undefined. Federal prosecutors took a broad view of the phrase and employed the statute to charge both public officials and private parties with a range of misdeeds that at their core involved self-dealing and conflicts of interest. Thus, for example, in securities fraud and insider-trading cases, federal prosecutors often charged the defendant executive or employee with depriving the company and its shareholders of the honest services owed them. *Skilling* and *Black* exemplify this type of case. Section 1346's breadth and flexibility made it extremely useful to prosecutors: It was the lead charge asserted against 79 defendants in 2007, up from 63 in 2005, and 28 in 2000. Lynne Marek, *DOJ may rein in use of "Honest Services" statute*, Natl. L.J., June 15, 2009, at 1, *available at* www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202431433581; *see also* Lisa L. Casey, *Twenty-Eight Words: Enforcing Corporate Fiduciary Duties Through Criminal Prosecution of Honest Services Fraud*, 35 Del. J. Corp. Law 1, 43 and n.244 (2010) (finding that at least 107 federal dockets referenced honest services fraud in 2008, up from 86 in 2007), *available at* http://ssrn.com/abstract=1557351.

During this period, defendants often argued that their conduct did not fall within the honest-services statute, or that the statute was so vague that it violated due process by failing to provide adequate notice as to what conduct it proscribed. The lower federal courts struggled to clarify the scope of the statute, resulting in varying and sometimes conflicting definitions of the concept of "honest services."

What Did *Skilling* Decide?

Although presented with an opportunity to strike down the "honest services" fraud statute as unconstitutionally vague, the Supreme Court, with Justice Ginsburg writing for the majority, held that it could be preserved by limiting section 1346 to offenses involving bribery and kickbacks, which comprised the "heartland" of section 1346 violations under pre-*McNally* case law. *Skilling*, 130 S. Ct. at 2931 and n.44. The Court concluded that Congress, in passing section 1346, had intended to restore the honest-services fraud doctrine recognized by the courts of appeals before *McNally*, and which primarily focused on bribery and kickbacks. *Id.* Justice Scalia, joined by Justices Thomas and Kennedy, concurred in the judgment but would have found the statute unconstitutionally vague.

Bribery and Kickbacks

Skilling did not define the precise scope of bribery and kickbacks encompassed by the statute, but noted that the "prohibition on bribes and kickbacks draws content not only from the pre-*McNally* case law, but also from federal statutes proscribing and defining similar crimes, [such as] 18 U.S.C. §§ 201(b), 666(a)(2); 41 U.S.C § 52(2)." *Skilling*, 130 S. Ct. at 2931. Section 201(b) prohibits bribery of federal officials to influence an official act or to induce the official to do or omit to do anything that violates the official's lawful duty; section 666 prohibits the acceptance of bribes by public officials; section 52(2) prohibits paying or accepting a kickback (essentially, something of value in exchange for favorable treatment) in connection with government contracts. *McNally* "involved a classic kickback scheme" in which a public official awarded a contract to a company in exchange for that company's sharing its commissions with entities in which the official had an interest. *Id.* at 2932. Many state laws also penalize bribery and kickbacks.

Both bribery and kickbacks are punishable under the honest-services statute only where a fiduciary duty exists, but *Skilling* does not provide much guidance on the source or scope of this fiduciary duty. Prior to *Skilling*, some circuits had held that state law determines the existence of a fiduciary duty. *E.g.*, *United States v. Brumley*, 116 F.3d 728 (5th Cir. 1997); *United States v. Murphy*, 323 F.3d 102 (3d Cir. 2003). *See generally* Frank C. Razzano and Jeremy D. Frey, *U.S. Supreme Court's Recent Decisions on "Honest Services" Fraud Raise Questions About Fiduciary Duty, Quid Pro Quo, Mens Rea, and Other Issues*, 5 BNA Whitecollar 15 (2010). Other circuits had held that public officials always owe a fiduciary duty to the public. *E.g.*, *United States v. Sorich*, 523 F.3d 702, 712 (7th Cir. 2008); *United States v. Walker*, 490 F.3d 1282, 1297, 1299 (11th Cir. 2007); *United States v. Sawyer*, 239 F.3d 31, 41–42 (1st Cir. 2001). Potential ambiguity in the definition of fiduciary duty could lead to a variety of results in future cases. For instance, whether the alleged briber believed that the recipient was not authorized to receive the gift or had the intent to defraud, as well as whether the gratuity must be correlated with a specific action, may continue to be key issues in section 1346 bribery and kickback cases.

Even after *Skilling*, the honest-services statute affords federal prosecutors further

Message from the Editor

On behalf of the *Criminal Litigation* newsletter, I want to thank all of our committee members, contributors, and devoted readers for their continued support. Any attorney who wishes to contribute to the newsletter is encouraged to do so. Please forward your submissions to me (either electronically or in hard copy):

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Also, if you have any ideas for topics that you would like to see addressed in the newsletter, please let me know.

Joe Martini

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avenues for prosecution beyond those provided by other bribery statutes. As Justice Ginsburg made clear, "[o]verlap with other federal statutes does not render § 1346 superfluous. The principal federal bribery statute, § 201, for example, generally applies only to federal public officials, so § 1346's application to state and local corruption and to private-sector fraud reaches misconduct that might otherwise go unpunished." *Skilling*, 130 S. Ct. at 2934 n.46. Additionally, 18 U.S.C. § 666 covers only bribes over $5,000 in value, while the honest-services statute has no minimum.

Skilling's Impact on Pending Cases

In *Skilling*, along with *Black* and *Weyhrauch,* the Supreme Court vacated the convictions and remanded the cases for further proceedings because in each case the defendant's conduct lay outside the bribery and kickback "heartland." Conrad Black, the former CEO and chair of Hollinger International, was convicted on three counts of depriving Hollinger of his honest services by granting himself purported "noncompetition" fees that he failed to disclose to Hollinger. *Black v. United States*, 130 S. Ct. 2963 (2010). Alaska state legislator Bruce Weyhrauch was charged with soliciting future employment from a company at a time when the legislature was considering a tax bill that would affect that company. *Weyhrauch v. United States*, 130 S. Ct. 2971 (2010). Skilling's misrepresentation of Enron's financial health for personal profit, like Black's and Weyhrauch's conduct, did not constitute a bribe or kickback scheme. *Skilling*, 130 S. Ct. at 2934. But, because Skilling's and Black's indictments also alleged conspiracies to commit money-or-property fraud, the Court concluded that the appeals courts in each case would have to determine whether the error was harmless. *Id.*; *Black*, 130 S. Ct. at 2970.

Even after *Skilling*, the honest-services statute affords federal prosecutors additional avenues for prosecution beyond those provided by other bribery statutes.

Defendants across the country are successfully obtaining relief under the *Skilling* trio of cases. A few examples illustrate this trend. Five days after deciding *Skilling*, the Supreme Court vacated and remanded the convictions of former Alabama governor Don Siegelman and former HealthSouth CEO Richard Scrushy in connection with a scheme to bribe Siegelman. *Scrushy v. United States*, No. 09-167, 2010 WL 2571879 (U.S. June 29, 2010); *Siegelman v. United States*, No. 09-182, 2010 WL 2571880 (U.S. June 29, 2010). A New Jersey district court dismissed charges against Joseph A. Ferriero, the former Democratic Party chairman of Newark's Bergen County, for not disclosing his ownership in a firm that solicited contracts in towns where he had political influence. *United States v. Ferriero*, Crim. A. No. 08-00616, Order (D.N.J. Aug. 2, 2010). Former New York state Senate leader Joseph Bruno, convicted of a long-standing and wide-ranging scheme to use his public office to pursue private business gain, was released on bail pending appeal because, a district court judge concluded, his appeal raises "a substantial question of law" regarding whether he received bribes or kickbacks. *United States v. Bruno*, 1:09-cr-00029, Text Order (N.D.N.Y. July 22, 2010). The impact has been felt in cases involving private individuals as well; for example, the U.S. District Court for the Middle District of Alabama recently ruled that the honest-services statute does not apply to a lawyer who drafted county gambling rules while failing to disclose that he represented a gambling business that would benefit from the rules. *Hope For Families & Community Svc., Inc. v. Warren*, No. 3:06-CV-1113-WKW, 2010 WL 2629408, at *31 (M.D. Ala. June 30, 2010).

The government also preemptively has dropped several prosecutions in the wake of *Skilling.* For example, prosecutors have moved to dismiss an indictment of several public officials in Louisiana who were accused of using their official powers to increase the value of their private property on the ground that no bribery or kickbacks were alleged, and so no honest-services fraud prosecution could lie. Press Release, Dep't of Justice, *United States Asks Court to Dismiss Charges in Poverty Point Reservoir Fraud Case* (July 6, 2010), *available at* www.justice.gov/usao/law/news/wdl20100706.pdf.

Of course, many cases remain unaffected. In perhaps the most high-profile example, former Illinois governor Rod Blagojevich had sought to delay his trial in light of *Skilling*, but the court refused, noting that the allegations against him involved bribery and kickbacks. Ted Cox, *Judge Says "Honest Services" Charges Stick Against Blagojevich*, Chi. Daily Herald, June 30, 2010, *available at* www.dailyherald.com/story/?id=391152. Similarly, Robert Urciuoli, a Rhode Island CEO prosecuted for his role in a scheme to bribe a state senator, argued that his case should be dismissed because honest-services fraud covers only those who owe a fiduciary duty to the public (in his case, the state senator). The court ruled that "Urciuoli's . . . attempt to use [*Skilling*] in his favor, although imaginative, is hopeless" because the case involved "the core bribery offense preserved by *Skilling*." *United States v. Urciuoli*, No. 09-1504, 2010 WL 2814311, at *6–*7 (1st Cir. July 20, 2010). Similarly, where a defendant clearly has been convicted of an offense that survives *Skilling*, in addition to an honest-services charge, any relief will only be partial. For example, although honest-services allegations as part of an insider-trading prosecution were struck in light of *Skilling*'s limitation to "bribes or kickbacks," other broader mail-and-wire-fraud charges were unaffected because "[m]oney and property fraud survives the Supreme Court's recent decisions." *United States v. Hatfield*, No. 06-CR-0550, 2010 WL 2710616, at *5 (E.D.N.Y. July 15, 2010).

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No Longer Honest-Services Fraud	Still Honest-Services Fraud
Self-dealing and conflicts of interest *Example:* Officials or private individuals use their authority to secure personal benefits like employment for a relative.	**Bribery and kickbacks** *Example:* Someone with business before a public official or employee offers a gratuity or something of value in exchange for favorable treatment.
Example: An employee gives a lucrative public or private contract to a company in which he or she owns stock.	*Example:* A contractor provides free services to an official or employee who gave that contractor a lucrative contract.

How Might Prosecutors Respond?

The *Skilling* decision established that allegations of conflict of interest and self-dealing, such as those against Black and Skilling, no longer can support a prosecution under the honest-services-fraud statute. But prosecutors may still be able to reach conflicts of interest and self-dealing through other laws. Among the most obvious is the use of the "money or property," rather than "honest services," prong of the mail-and-wire-fraud statutes to prosecute breaches of fiduciary duty. When the Supreme Court repudiated honest-services fraud in *McNally*, Justice Stevens suggested in his dissent that prosecutors might argue that an employee who breaches a fiduciary duty in effect steals the salary he is paid, thus recasting a theft of honest services as a theft of property. *Compare United States v. Richerson*, 833 F.2d 1147, 1157 (5th Cir. 1987) (adopting theft-of-salary theory), *with United States v. Ochs*, 842 F.2d 515, 526–27 (1st Cir. 1988) (rejecting *Richerson* theory). Now that *Skilling* has limited section 1346 to bribes and kickbacks, prosecutors may revive this theory. *See* Peter M. Oxman, Note, *The Federal Mail Fraud Statute After* McNally v. United States, *107 S. Ct. 2875 (1987): The Remains of the Intangible Rights Doctrine and its Proposed Congressional Restoration*, 25 Am. Crim. L. Rev. 743, 745–46 (1988) (discussing the theft-of-salary theory and other prosecutorial strategies adopted after *McNally*).

In addition, a number of state and federal statutes penalize self-dealing and undisclosed conflicts of interest. *See, e.g.*, FAR 3.601 (prohibiting award of contract to business owned or controlled by a government employee); Ark. Code Ann. § 21-8-803 (2008); N.Y. Pub. Off. Law § 74 (2008). These laws can require that federal employees or officials refrain from representing parties adverse to the government before agencies and courts, 5 C.F.R. § 2635.805; 32 C.F.R. § 516.49, and from participating in matters in which they or their relatives have a financial interest, e.g., Ariz. Rev. Stat. § 38-503 (2008). But the federal conflict-of-interest and self-dealing statutes apply only to federal employees and officials, and state statutes vary widely as to what conduct they proscribe and how harshly they punish prohibited conduct. For example, some state statutes may provide for only civil penalties. *E.g.*, N.C. Gen. Stat. Ann. § 138A-45(a) ("Except as specifically provided in this Chapter and for perjury under G.S. 138A-12 and G.S. 138A-24, no criminal penalty shall attach for any violation of this Chapter."). Accordingly, prosecutors may not view these statutes as adequate substitutes for section 1346.

The Congressional Response

On September 28, 2010, Lanny Breuer, assistant attorney general for the Department of Justice's Criminal Division, urged Congress to pass legislation to "restore our ability to use the mail and wire fraud statutes to prosecute state, local, and federal officials who engage in schemes that involve undisclosed self-dealing." *See* Honest Services Fraud: Hearing Before the S. Comm. on the Judiciary, 111th Cong. (statement of Lanny A. Breuer, Assistant Attorney General, Criminal Division, U.S. Department of Justice). Breuer suggested that the new statute "rely upon the mail and wire fraud statutes," but "in order to define the scope of the financial interests that underlie improper self-dealing, the statute should draw content from the well-established federal conflict of interest statute, 18 U.S.C. § 208." *Id.* In addition, he argued, the statute "should provide that no public official can be prosecuted unless he or she knowingly conceals, covers up, or fails to disclose material information that he or she is already required by law to disclose." *Id.* Breuer also stated that the department was interested in working with the Judiciary Committee on legislation to address corrupt corporate officers. *Id.*

That same day, Senator Patrick Leahy (D-VT), Chairman of the Senate Judiciary Committee, introduced the Honest Services Restoration Act, S. 3854, which would amend the definition of "scheme or artifice to defraud" in 18 U.S.C. § 1346 to include a scheme or an artifice "by a public official to engage in undisclosed self-dealing," or "by officers or directors to engage in undisclosed private self-dealing." The bill defines "undisclosed self-dealing" as the performance of an official act for the purpose of benefiting or furthering a financial interest of the official or certain related or associated individuals or entities, where disclosure of that financial interest is required by federal, state, or local law. *Id.* The bill defines "undisclosed private self-dealing" as the performance of an act that causes or is intended to cause harm to an officer or a director's employer,

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and is undertaken to benefit the financial interest of the officer or director or a related or associated individual or entity, where disclosure is required by law. Leahy issued a press release explaining that the new statute "targets cases in which officials failed to disclose the interests they benefited in violation of federal, state and local disclosure laws." Press Release, Sen. Patrick Leahy, Leahy Introduces Bill to Address Supreme Court's *Skilling* Decision (Sept. 28, 2010), *available at* http://leahy.senate.gov/press/press_releases/release/?id=d8b2c597-548f-49cc-aaa9-9ac7cb8792a8 (last visited Nov. 8, 2010). The bill was referred to the Senate Judiciary Committee, which, as of press time, has not yet acted.

Conclusion

Contrary to many predictions that it would strike down the honest-services statute altogether, the Supreme Court, in *Skilling* and its companion cases, limited the law to bribes and kickbacks. Although many pending prosecutions will survive *Skilling*, a number of lower federal courts also are reconsidering the propriety of charges of honest-services fraud in pending cases, and some such cases have been dismissed altogether. It remains to be seen how federal prosecutors and Congress will respond. Clearly, though, the *Skilling* trio of cases will continue to affect white-collar criminal practice for many years to come. ■

Iris E. Bennett is of counsel, Jessie K. Liu is a partner, and Cynthia J. Robertson is a government contracts emerging issues attorney with Jenner & Block LLP in Washington, D.C., and Govind C. Persad is a J.D. candidate at Stanford University Law School.

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Criminalizing Management Decisions: Prosecuting the Responsible Corporate Officer

BY LISA KRIGSTEN

In March 2010, the U.S. Food and Drug Administration (FDA) revealed that it had created new case-selection criteria for the prosecution of responsible corporate officers. This indicates a likely shift in agency priorities. Accordingly, the announcement has created a revived interest in the responsible-corporate-officer doctrine.

It is widely assumed that an indictment for corporate misconduct must involve either the corporation itself or the "bad actors" therein. There is a presumption that a criminal defendant must, at the very least, have some consciousness of the alleged wrongdoing. Painting in such broad strokes, though, misses an important theory of corporate criminal liability.

The responsible-corporate-officer doctrine upends the traditional theories of culpability. It provides that simply by virtue of a person's responsibility within a company, he or she may be prosecuted for criminal violations of law. In other words, corporate presidents and CEOs may be convicted and potentially sentenced to a term of imprisonment without committing a knowing, reckless, or even intentional act. The conviction can be premised simply on the officer's job description in the corporate bylaws.

For companies within the FDA's reach, the new criteria should lead to a renewed focus on effective corporate compliance.

The Principles Behind Prosecuting Corporate Officers

The responsible-corporate-officer doctrine provides that a defendant may be guilty if he or she had, "by reason of his [or her] position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct," the alleged violations of law. *United States v. Park*, 421 U.S. 658, 673–74 (1975). Notably, the law does not require a corporate officer to be aware of wrongdoing within the company. Instead, the officer is culpable simply because he or she had the authority either to prevent or to remedy the criminal violation.

The doctrine originated with a 1943 case brought under the Food, Drug, and Cosmetics Act. *See United States v. Dotterweich*, 320 U.S. 277 (1943). In *Dotterweich*, a drug company and its president were prosecuted for the shipment of misbranded and adulterated drugs. The company was acquitted, but the jury convicted the company's president. In affirming the *Dotterweich* conviction, the U.S. Supreme Court acknowledged that the president had no role in or knowledge of the company's wrongful acts. Nonetheless, the Court determined that it was "in the interests of the larger good" to place "the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger." *Dotterweich*, at 281.

The concept of public danger is the underpinning of all responsible-corporate-officer doctrine prosecutions. Use of the doctrine has been limited to cases involving regulatory or public-safety crimes that do not have a *mens rea* element. As explained by the U.S. Supreme Court,

> [m]any of these offenses are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty. Many violations of such regulations result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize.

Morrissette v. United States, 342 U.S. 246, 255–56 (1952). In other words, the doctrine punishes corporate officers regardless of whether any harm actually occurred or whether the officer acted with any other bad purpose.

The Classic Cautionary Tale

Nearly 30 years ago, John Park was the CEO of a national retail food chain with more than 36,000 employees operating out of 874 retail establishments. *See United States v. Park*, 421 U.S. 658, 660 (1975). The company also had 16 warehouses that held food destined for sale. Over the course of several months, FDA inspectors discovered numerous sanitation violations, including rodent infestation, in a handful of the warehouses. To be sure, the description of the infestation is less than appetizing; investigative reports state that ". . . rodent gnawed holes were noted among bales of flour. . ." and that ample evidence existed of "potential rodent harborage" in debris piled near bakery and warehouse doors.

In correspondence with the company, the FDA expressed frustration that unsanitary conditions had "existed for a prolonged period of time without any detection" or had been "completely ignored." Although there was ample basis for the FDA's concern, Park had not been personally involved with the sanitation issues. He was not present in the warehouses, nor did he actively or implicitly encourage employees to disregard sanitation regulations. Instead, it appears Park acted with modern executive efficiency. Upon learning of the sanitation issues, a company vice president was assigned to "investigat[e] the situation immediately" and report back regarding the corrective action taken in response to the unsanitary conditions.

Regardless, the government indicted both Park and the company for violations of the Federal Food, Drug, and Cosmetic Act. Park's indictment was based on a responsible-corporate-officer doctrine theory of liability. At trial, the company's corporate secretary testified for the government. He read to the jury the corporate bylaw describing Park's responsibilities. He further testified about Park's delegation style, described as follows, "[Park] functioned by delegating 'normal operating duties,' including sanitation, but that he retained 'certain things, which are big, broad, principles of the operation of the company,' and had 'the responsibility of seeing that

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they all work together.'"

For his part, Park reminded jurors that, as CEO, he was responsible for the "entire operation of the company." He testified that he relied on "dependable subordinates" to assist in operating many parts of the company, including sanitation. Park also testified that he had done everything possible to remedy the problem.

The jury apparently was not sufficiently convinced by Park's testimony, though, as Park was found guilty on all counts. Initially, Park's conviction was reversed on the basis that he personally had not taken any "wrongful action." Following an appeal to the U.S. Supreme Court, however, the conviction was reinstated. In its opinion, the Court declined to adopt any requirement that a defendant must be aware of or take part in a wrongful act to be convicted of a strict liability regulatory offense.

Even with the ubiquity of smart phones, video conferencing, and low-cost air travel, corporate executives can be layers removed from the day-to-day regulatory issues facing the company.

The Court acknowledged that the law might sweep in individuals "remotely entangled" in the offense. Nevertheless, in language destined for corporate-compliance manuals, the Court noted that: ". . . those corporate agents vested with the responsibility, and power commensurate with that responsibility, to devise whatever measures are necessary to ensure compliance with the [law] bear a 'responsible relationship' to, or have a 'responsible share' in, violations." *Park*, 421 U.S. at 672. In other words, despite hiring a dependable management team to help operate a large national company, Park was guilty because ultimate responsibility for sanitation compliance stopped at his desk.

The Contours of a Responsible-Corporate-Officer Prosecution

Historically, the doctrine has been used judiciously by prosecutors. This presents challenges in determining how to properly instruct a jury. At least one federal circuit, though, has developed a pattern instruction that encompasses a responsible-corporate-officer theory; the Third Circuit has approved the following:

> . . . [an employee] is not criminally responsible for illegal acts committed on behalf of that corporation merely because of [his or her] status as an [employee] of the corporation *unless the defendant had, by reason of his or her position in the corporation, responsibility and authority either to prevent in the first instance, or promptly correct, the violation complained of, and failed to do so.*

Model Third Circuit Jury Instructions: Criminal § 7.07 (2009) (emphasis added).

While other circuits have pattern instructions on corporate-officer responsibility, such instructions tend not to reflect the idea of responsible-corporate-officer culpability. Instead, most indicate that officers are responsible only for acts that they performed personally, as an aider and abettor, or as a coconspirator. The doctrine, though, is not premised on any of those theories. For example, there does not have to be evidence that the officer "counsel[ed], command[ed], induce[d], or procure[d]" the commission of any act or omission to sustain a conviction. *See* 18 U.S.C. § 2 (defining aiding and abetting).

Similarly, the doctrine is distinguishable from conspiracy. While conspirators may be unaware of each act taken in furtherance of the conspiracy, the crime of conspiracy is predicated on a meeting of the minds regarding criminal activity. There must be evidence that each defendant reached an agreement or understanding with one other person involved in the conspiracy. By contrast, responsible-corporate-officer cases do not rely on any agreement—implicit or explicit—within the organization. In fact, the officer may be the only name on an indictment; charges against the officer are wholly independent of charges against the company or its other employees.

There are, however, some limitations on the types of cases in which the doctrine may be invoked. First, the case must involve a strict-liability offense. The following are generally accepted criteria for determining whether a statute provides for strict liability: (1) The statute does not mention intent; (2) the penalty for a violation is "relatively small;" (3) a conviction under the statute would not "gravely" damage a defendant's reputation; and (4) congressional history does not indicate a desire to include an intent element. *See Holdridge v. United States,* 282 F.2d. 302, 310 (8th Cir. 1960). Of course, as a conviction may result in a jail sentence, vantage point plays a role in evaluating the penalty size and potential reputational damage.

Second, the corporate officer must have been aware that the company placed him or her "in a responsible relation to a public danger." *Staples v. United States*, 511 U.S. 600, 607 (1994) (*citing Dotterweich*, 320 U.S. at 281). Put another way, the doctrine may be used in cases in which "a reasonable person should know that the conduct is subject to stringent regulation and may seriously threaten a community's health and safety." *United States v. Unser*, 165 F.3d 755, 762 (10th Cir. 1999) (*citing Liparota v. United States*, 471 U.S. 419, 433 (1985)). In such situations, the burden is on a defendant "to ascertain at his peril whether [his conduct] comes within the inhibition of the statute." *Staples,* 511 U.S. at 607 (*citing United States v. Balint*, 258 U.S. 250, 258 (1922)). This limitation is designed to address due-process concerns about using the doctrine against an otherwise innocent corporate officer.

In addition to these limitations, courts have recognized an affirmative defense in responsible-corporate-officer cases. The affirmative defense of "impossibility" permits a defendant to demonstrate that it would have been impossible to remedy the regulatory violations. The defense stems from the Supreme Court's opinion in *United States*

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v. Park, in which the Court mused whether Park could have prevailed upon proving that, despite his position, he actually lacked the power to change the conditions at the warehouses. In cases since *Park*, defendants have argued that, notwithstanding having exercised "extraordinary care," it was impossible for them to have stopped the violation. *See United States v. New England Grocers Supply Co*, 488 F. Supp. 230, 235 (D. Mass. 1980).

Corporate Compliance and the Responsible-Corporate-Officer Doctrine

Compliance is the key to avoiding responsible corporate officer liability. An effective compliance program both prevents violations as well as alerts corporate officers of violations as soon as they occur. The following two guideposts should be used in evaluating the strength of a company's compliance efforts.

Understand the Company's Regulatory Environment

Companies in every regulated industry are vulnerable to a prosecution under the responsible-corporate-officer doctrine. To provide effective counsel, attorneys must understand which public-health and -safety regulations may be applicable to a client's industry. Compliance efforts then can be specifically tied to those violations.

Some strict-liability statutes are industry-specific. For example, the pharmaceutical, medical-device, and retail-food industries, all of which come under the auspices of the FDA, must comply with the Federal Food, Drug, and Cosmetic Act. That act penalizes, inter alia, introducing or delivering an "adulterated or misbranded" food, drug, device, or cosmetic into interstate commerce. *See* 21 U.S.C. § 331 (providing a list of prohibited acts). A misdemeanor violation of the act does not require that the defendant acted knowingly, willfully, or even in reckless disregard.

In addition, the agricultural sector of the food industry must be concerned with strict liability prosecutions under a variety of statutes. Recent headlines about food contamination may implicate statutes enforced by the U.S. Department of Agriculture. This includes the Federal Meat Inspection Act's adulterating and misbranding provisions, which outline strict-liability violations. *See* 21 U.S.C. §§ 610 and 676(a). It also includes egg- and poultry-inspection statutes.

Other strict-liability statutes are not tied to a specific industry. For instance, both the Clean Water Act and the Clean Air Act contain language about holding "responsible corporate officers" accountable. In fact, the statutes appear to go further than the traditional use of the doctrine; they permit willful acts to be "imputed" to the corporate officer. *See United States v. Brittain*, 931 F.2d 1413, 1419 (10th Cir. 1991) (finding that under the Clean Water Act, "a 'responsible corporate officer,' to be held criminally liable, would not have to 'willfully or negligently' cause a permit violation. Instead, the willfulness or negligence of the actor would be imputed to him by virtue of his position of responsibility.")

This is far from a comprehensive list of federal strict-liability regulatory violations. There also are several states that use the doctrine in criminal prosecutions involving environmental and other public-welfare statutes. The initial challenge in evaluating compliance programs, therefore, is identifying the criminal statutes upon which a prosecution could be based.

Understand the Company's Compliance Chain of Command

Most company presidents no longer can step out of their office and into the warehouse or onto the plant floor. Even with the ubiquity of smart phones, video conferencing, and low-cost air travel, corporate executives can be layers removed from the day-to-day regulatory issues facing the company. This reality presents challenges to building an effective compliance program.

Particularly in highly regulated industries, company executives need to remain personally engaged in some of the company's public-safety and public-welfare activities. To begin, executives should be encouraged to carefully review the chains of command within the organization. This review would involve determining precisely how potential regulatory violations should be reported to the management team. For instance, individuals working on environmental and product-safety issues should have a clear line of report to the executive suite. This also would involve an analysis of corporate-governance documents to ensure that they accurately outline the responsibilities of each position.

Once the review is complete, the company must have a process by which employees are encouraged to give management notice of potential issues. Everyone in the company needs to be held accountable not just for preventing violations, but also for promptly reporting violations through the chain of command. This internal culture of openness and accountability gives corporate officers ample time to implement measures to remedy violations and, better yet, keep additional violations from occurring.

Finally, executives need to understand which issues should trigger their personal involvement. For example, the results of an FDA inspection not only should immediately reach the executive management, but also such management should be actively involved in responding to any alleged deficiencies. A key to avoiding problems for the company, as well as for the corporate officers, is quickly identifying incidents that demand personal attention.

Conclusion

In corporate America, accepting responsibility for wrongdoing often is the mark of strong leadership. Much like the famous "The Buck Stops Here" sign that President Truman kept on his desk, corporate presidents often publicly take responsibility for their company's shortcomings. For corporate leaders in regulated industries, though, the FDA's recent announcement means that accepting such responsibility is likely to become less metaphor than reality. ■

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New Health-Law-Compliance Requirements from the Federal Health Reform Law

BY MATTHEW R. FISHER

With the enactment of the Patient Protection and Affordable Care Act (PPACA) and the accompanying Health Care and Education Reconciliation Act of 2010 (HCERA; together with PPACA, the "Health Reform Law"), the federal government created or modified significant areas of healthcare fraud and abuse law. The changes impact a wide range of preexisting health laws, including the Stark Law, the Anti-Kickback Statute, and the False Claims Act (FCA).

Stark Law Changes

The Stark Law prohibits physicians from referring Medicaid or Medicare patients to an entity with which the referring physician has a direct or indirect financial relationship. Referrals can only be made if the physician qualifies for one of the exceptions specifically set forth in the Stark Law or the regulations implementing the law. Physicians who violate the Stark Law are subject to civil monetary penalties, and may also be excluded from participation in Medicare and Medicaid programs. A violation of the Stark Law does not require proof of intent; therefore, careful attention must be paid to ensure compliance with its many associated and complicated regulations. The changes discussed below modify some of the Stark Law exceptions and create new obligations with which physicians must comply to ensure continued good standing in the Medicare and Medicaid programs.

In-Office Ancillary-Services Exception

Section 6003 of PPACA amends the in-office-ancillary-services exception to the Stark Law. This exception generally states that a physician does not make an improper referral if the physician sends a patient to receive additional services provided in the physician's office. However, the Health Reform Law now requires physicians to inform patients that the ordered services are available from other providers outside of the physician's office. The disclosure must be done in writing and include a list of other providers who offer the ordered service in the area where the patient resides. The Centers for Medicaid and Medicare Services (CMS) have not clarified what constitutes the area where a patient resides, but regulatory or informal guidance is expected soon.

Self-Disclosure Protocol

Section 6409 of PPACA orders the Secretary of Health and Human Services (HHS), the department that oversees CMS, to create a new self-disclosure protocol. On September 23, 2010, CMS released the Self-Referral Disclosure Protocol (SRDP). If a party elects to enter the SRDP, the party must submit a detailed report to CMS that explains all of the violations that are being reported and the legal basis for why the reported actions are violations. Once a party enters the SRDP process, the party must also cooperate with the Office of the Inspector General (OIG) for the Department of Health and Human Services and the Department of Justice in connected investigations.

Any knowing and willful submission can be a violation, as long as the person or entity knew or should have known that the claim was false.

A party is not barred from entering the SRDP even if that party is already the subject of an ongoing inquiry. However, the party's self-disclosure must be made in good faith and must not be part of an effort to circumvent the investigation process. Further, entry in the SRDP tolls a party's obligation to return an overpayment within 60 days (a process described in more detail later in this article).

Under the new protocol, if a physician self-discloses a violation, CMS is authorized to negotiate reduced penalties with the self-disclosing physician. The ability to negotiate reduced penalties is an important change in the Health Reform Law. Previously, CMS could not negotiate a reduced penalty for a Stark Law violation; instead, full repayment had to be pursued. With the new flexibility provided by the Health Reform Law, the following factors will be considered in determining the penalty to be recovered: (1) the nature and extent of the illegal conduct, (2) the timeliness of the self-disclosure, (3) the physician's cooperation with CMS in providing additional information; and (4) other factors deemed appropriate. The ability to seek a reduced penalty will likely encourage use of the self-disclosure protocol.

Anti-Kickback Statute

The anti-kickback statute imposes criminal penalties for knowingly and willfully soliciting, receiving, offering, or paying remuneration to induce referrals reimbursable under Medicaid or Medicare. Similar to the Stark Law, certain safe harbors, such as space rentals and personal service contracts, are built into the anti-kickback statute to enable avoidance of liability. All of the exceptions and corresponding elements of the exceptions are set forth in 42 C.F.R. § 1001.952. Again, those exceptions must be followed explicitly to avoid a violation.

A violation of the anti-kickback statute can result in the imposition of monetary penalties and even imprisonment. Further, a determination that the anti-kickback

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statute was violated will also likely result in a finding that the Stark Law, False Claims Act, or other statutes related to the Medicaid and Medicare programs were violated.

Because it is a criminal statute, the anti-kickback statute requires a finding of intent. Thus, to establish a violation, the government must prove the alleged wrongdoer's intent to induce the improper conduct through provision of a payment.

The Health Reform Law eases the government's burden of proof by establishing a reduced level of intent. The Health Reform Law inserts new language stating that "a person need not have actual knowledge of this section or specific intent to commit a violation" of the anti-kickback statute. PPACA, § 6402(f). The Health Reform Law directly repudiates the Ninth Circuit's decision in *Hanlester Network v. Shalala*, 51 F.3d 1390 (9th Cir. 1995). In *Hanlester*, the Ninth Circuit found the anti-kickback statute to require both specific knowledge of the law *and* the specific intent to violate the law. The change in the Health Reform Law removes the case-law-imposed specific-intent standard and instead replaces it with a relaxed requirement that an individual must only have an intent to induce improper referrals or purchases.

The Health Reform Law also makes a violation of the anti-kickback statute a violation of the FCA. Section 6402(f) provides that a kickback constitutes a false claim. This change thus exposes a violator of the anti-kickback statute to multiple civil damages through the FCA.

Civil Monetary Penalties

The Health Reform Law also amends the Civil Monetary Penalties Law by creating the following enhanced penalties (contained in sections 6402(d) and 6408 of PPACA):

- knowingly making false statements in an application, a bid, or a contract to participate in or enroll in Medicare or Medicaid—up to $50,000 per violation
- knowingly making or using a false record or statement that is material to a false or fraudulent claim for payment under Medicare or Medicaid—up to $50,000 per violation
- failing to provide the OIG, upon reasonable request, timely access for the purpose of conducting an audit, investigation, evaluation, or other statutory function—up to $15,000 per day that the OIG is kept out
- ordering or prescribing items or services when the person ordering or prescribing the items or services is excluded from participation in Medicare or Medicaid
- failing to report and return overpayments (detailed above).

Violations of the Civil Monetary Penalties Law can result in the rapid accumulation of fines. Therefore, attention must be paid to the statute to ensure that a party is fully compliant.

False Claims Act

The FCA is a federal statute that enables the government, and private parties acting as relators in a qui tam suit, to recover from a party that is determined to have submitted false documentation to the government to receive a payment. Any knowing and willful submission can be a violation, as long as the person or entity knew or shouxld have known that the claim was false.

Public Disclosure Bar and Qui Tam Suits

As stated above, section 6402(f) of the Health Reform Law explicitly states that a violation of the anti-kickback statute constitutes a false and fraudulent claim as is prohibited under the FCA. This addition will make a broader range of conduct subject to potential qui tam claims.

A qui tam case may be brought under the FCA only if the whistle-blowing plaintiff is the original source of the information. This requirement prevents plaintiffs from using publicly available information as a basis for a claim and improperly seeking a share of a recovery. Previously, this public-disclosure bar was interpreted broadly and swept in a wide range of information deemed to be publicly available. However, the Health Reform Law reduced the universe of information deemed publicly available, making it easier for a qui tam suit to be initiated.

Section 10104(j)(2) of PPACA inserts language defining "publicly available" as information disclosed (1) by a federal criminal, civil, or administrative hearing, (2) in a congressional; Government Accountability Office; or other federal report, audit, or investigation, or (3) by the news media. This eliminates a dispute as to whether information discovered from a state or local administrative hearing was publicly available and thus would bar a qui tam plaintiff from bringing suit.

Additionally, the definition of "original source" was expanded. An original source no longer needs to have direct and independent knowledge. Now, an original source need only have knowledge that is independent from and adds to already publicly disclosed information. As with other revisions, these changes remove several hurdles to bringing a *qui tam* suit under the FCA. It is anticipated that more cases will survive an initial attack that the information was either already publicly available or not from an original source.

Reporting and Returning of Overpayments

Section 6402 of PPACA introduces an express duty to return and report overpayments received pursuant to both Medicare and Medicaid. The mandatory return and report must be made by the later 60 days after discovering the overpayment or the date when any corresponding cost report is due. If an overpayment is retained, it will

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be considered an "obligation" under the False Claims Act, which exposes the party retaining the overpayment to the penalty provisions of that act.

This change is significant because it imposes an affirmative obligation on all entities receiving Medicare and Medicaid payments to ensure such payments are for the proper amount. As set forth in the Health Reform Law, any retention of an overpayment will be considered a False Claims Act violation, even if receipt and retention of the overpayment is unintentional.

The new requirement to return overpayments follows the recent efforts by HHS and the OIG to increase screening for excluded persons and eliminate payments made to or on behalf of services provided by excluded persons. An excluded person is a person or an entity that is barred from submitting a claim or having a claim submitted on its behalf to Medicare or Medicaid. In January 2009, HHS issued a state Medicaid director letter setting forth screening obligations for providers. The letter requires screening programs to be implemented and run on a monthly basis by providers to ensure that no payments are made to excluded persons. The efforts related to excluded persons and the newly enhanced overpayment return requirement are interconnected because any claim that is based upon services rendered, at least in part, by an excluded person is an overpayment. Therefore, the duty to identify and return overpayments takes on additional significance.

Conclusion

The Health Reform Law enacts wide-ranging changes to the Medicare and Medicaid programs and imposes new duties upon providers and other related entities. Care must be given to ensure that all new requirements are followed because, as with preexisting health laws, penalties can accumulate quickly. ■

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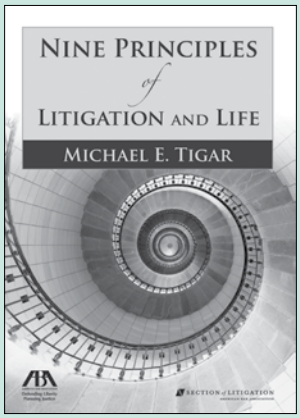

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Herring v. United States: Are Errors in Government Databases Preventing Defendants from Receiving a Fair Trial?

BY ALEX R. HESS

Technology has blurred the lines regarding admissibility of evidence at trial. The exclusionary rule requires suppressing at trial evidence obtained through an illegal search and seizure. However, the Supreme Court has consistently narrowed the exclusionary rule by expanding the good-faith exception, allowing into evidence illegally seized evidence. *Herring v. United States* further limits the exclusionary rule in cases where erroneous information gleaned from a government database forms the basis for probable cause for an arrest and resulting search. *Herring v. United States*, 129 S. Ct. 695 (2009). Under *Herring*, incriminating evidence found during a search based on an error or a mistake in a government database is admissible.

In the modern age, where law enforcement is dependent on computers, the accuracy of government databases may determine whether a defendant gets a fair trial. *Herring* leaves suspects and defendants vulnerable to computer errors in government databases. It is reasonable to require law enforcement to keep accurate criminal records and warrant information. Under *Herring*, errors in government databases have the potential to infringe on an individual's right against unreasonable searches and seizures by allowing searches where the probable cause is based on these mistaken records. Whether the errors are intentional or merely negligent, the result is unfair: The accused is faced with illegally seized evidence, and the government receives no penalty for keeping incorrect records. As policing becomes more reliant on computerized systems, the number of illegal arrests and searches based on errors in government record keeping is poised to multiply.

Errors in Government Databases

In 1967, FBI director J. Edgar Hoover created the National Crime Information Center (NCIC), a national database containing information about criminal records. Through the NCIC, criminal records and warrant data are exchanged by federal and state law-enforcement agencies. However, the law authorizing the attorney general to establish and maintain this database of criminal information does not mention accuracy, only his or her power to collect the information. *See* 28 U.S.C § 534.

Since the NCIC was created, its criminal records and warrant information have contained errors. From 1971 to 1984, during his time as executive director of the American Civil Liberty Union's Washington, D.C., office, John Shattuck was at the forefront of major civil-rights issues during the Nixon, Ford, Carter, and Reagan administrations, often involving the accuracy of government databases. During this period, errors in government databases have had an impact on the lives of real people. In New Orleans, a mother on welfare was arrested and jailed for 18 hours due to an inaccurate crime report in the police computers. She sued the police department for false arrest and for failing to maintain the accuracy of their computerized files. In New York, a man was denied a taxi license because a computerized credit report showed that when he was 13 years old in Massachusetts he temporarily had been placed in a mental institution, but the file failed to show that he was an orphan and the institution was the only home the state authorities could find for him for a period of four years. In Ohio, five employees of a clothing store were fired and the employer spread reports that the employees had been stealing, although none was ever charged with theft. These are just a few instances of how errors in government databases have disrupted the lives of individuals, and how serious criminal consequences may result.

Reports of these errors prompted Congress to pass the Privacy Act of 1974 requiring government agencies to keep accurate records. *See* 5 U.S.C. §552a. While the Privacy Act may have initially caused agencies to keep more accurate records, post-9/11 policies have again raised the issue of errors in government databases. Recently, the bite of the Privacy Act has been severely weakened due to exemptions granted to certain government agencies. In 2003, the Department of Justice exempted the Department of Homeland Security (DHS) and the FBI from the requirement that these agencies assure the accuracy of their databases. 28 C.F.R. 16.96. A follow-up investigation by the Government Accountability Office revealed a myriad of errors in the DHS database. These errors, coupled with a lack of upkeep, caused the judiciary to react.

In 2007, the federal district court in Northern California granted a temporary restraining order enjoining the DHS from implementing a verification program for employment eligibility because numerous errors in Social Security Administration databases created unverified and inaccurate employment application reviews and decisions. However, while a job applicant may have to wait months to obtain a job, the stakes are even higher during a criminal proceeding. Where government database accuracy plays a key role in law enforcement, it may mean the difference between liberty or a jail cell.

Herring v. United States

On July 7, 2004, Bennie Herring went to the Coffee County Sheriff's Department to retrieve his impounded truck. While getting his car, an investigator checked for outstanding warrants in the warrant database. When the warrant search came back negative, the investigator asked the warrant clerk in neighboring Dale County to check. After searching their computer database, the Dale County warrant clerk informed the investigator that there was an active arrest warrant for Mr. Herring for failing to appear for felony charges.

Based on this warrant from Dale County, Herring was stopped and arrested as he was leaving the impound lot in his

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vehicle. A search incident to the arrest revealed methamphetamine in Herring's pocket and a gun in his vehicle. However, 15 minutes later the database warrant was discovered to be an error. When trying to locate a paper copy of the warrant, the Dale County clerk learned that the warrant had been recalled five months earlier. For whatever reason, the information about the recall was never entered into the database. Prior to trial for possession of a gun and drugs, Herring moved to suppress the evidence seized on the ground that the initial search had been illegal because the warrant had been recalled. However, the district-court judge denied the motion, reasoning that even though there was a Fourth Amendment violation, application of the exclusionary rule would not deter future similar mistakes.

The Supreme Court affirmed Herring's conviction, holding that because the mistake was made by a court clerk (or warrant clerk) and not by a police officer, applying the exclusionary rule would not deter police misconduct in the future. In essence, the Court concluded that punishing negligent bookkeeping errors of clerks would have no deterrent effect against police conducting illegal searches and seizures. The numerous government-database errors pointed out by Herring's attorney during oral arguments were dismissed by the Court because there was no evidence presented that errors in Dale County's warrant system were routine or widespread. According to the *Herring* Court majority, officers would be reckless where relying on a database where systematic errors have been demonstrated or on an unreliable warrant system. Perhaps the outcome of this case would have been different if Herring's attorney had shown the court specific errors in the Dale County warrant system. However, with all the errors in the NCIC and other government databases, it is only a matter of time before the issue in *Herring* resurfaces and the Supreme Court, or another appellate court, will again have to confront this issue.

It is only a matter of time before the issue in *Herring* resurfaces and the Supreme Court, or another appellate court, will again have to confront this issue.

Effect of *Herring*

According to Steve Posner, "*Herring* represents a policy decision by the Court that convicting criminals is more important than preventing citizen victimization due to police negligence in record keeping, unless such errors are shown to be so widespread or systematic that police would be reckless in relying on the particular database at issue." Steve C. Posner, *Herring v. United States, the Exclusionary Rule, and the USA Patriot Act "Fall of the Wall,"* 2009 Emerging Issues 3647, 1 (2009).

While it is true that the holding of *Herring* can be read broadly or narrowly, the true effect will be seen in future suppression disputes in trial courts that try to interpret and apply the decision. What scholars are missing in debating whether the *Herring* holding is broad or narrow is that the facts are likely to happen again. Next time the outcome may be different. As pointed out above, the *Herring* Court did not apply the exclusionary rule because Herring's attorney did not demonstrate a pattern or widespread errors in the Dale County database. Maybe in the next case concerning government-database errors, the diligent defense attorney subpoenas hundreds of electronic records from the database that contained the error against his client and searches for other errors in that database. While the logistics of doing this seem almost implausible, the *Herring* opinion suggests that if there is a pattern of errors, or if they are widespread through the database, then the police would be reckless to rely on them, and the exclusionary rule would be applied.

According to Bureau of Justice statistics, "in the view of most experts, inadequacies in the accuracy and completeness of criminal history records is *the single most serious deficiency* affecting the Nation's criminal history record system." For example, a man found himself in a similar predicament to Bennie Herring when he purchased a computer report of his records. The report listed him as a female prostitute in Florida, an inmate currently incarcerated in Texas for manslaughter, a stolen goods dealer in New Mexico, a witness tamperer in Oregon, and a registered sex offender in Nevada. This man's record was an example used in an amicus brief filed by the Electronic Privacy Information Center in the *Herring* case, pointing to the numerous inaccuracies in these databases. Record accuracy was an issue long before Bennie Herring was searched pursuant to an invalid warrant, and it will continue to be a problem the lower courts must deal with when applying *Herring*.

Herring in Practice

The *Johnson* case out of Louisiana state court is a prime example of how *Herring* affected one defendant negatively and actually shifted the tides mid-litigation. Robert Johnson was stopped for driving without a seatbelt, but upon running a search, the police arrested Johnson on an outstanding warrant. A search following the arrest revealed marijuana in his pocket. Once Johnson was booked and charged with one count of possession, a check in the NCIC system revealed that the warrant was no longer valid. *See State of La. v. Johnson*, 6 So. 3d 195 (2005).

The defendant moved to suppress the marijuana evidence, arguing that the officer should have run Johnson's name through NCIC to verify the validity of the warrant before conducting a search incident to arrest. The trial court agreed and suppressed the evidence. As of this point, prior to the *Herring* decision, the evidence was suppressed and the defendant experienced significantly lesser consequences due to an error in a state-warrant database. However,

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immediately after the *Herring* decision, the state appealed in light of the Supreme Court's new view on defective warrants in governmental databases and how the exclusionary rule should be applied. The Louisiana Court of Appeals reversed the trial court's ruling and held that "the officer in this case acted in good faith when he arrested Johnson based on the information available to him at the time." *Johnson*, 6 So. 3d at 196. Just days earlier, the defense had won its motion based on an illegitimate finding of probable cause—now the prosecution was allowed to use evidence obtained from a search predicated on an invalid warrant.

However, as the *Robinson* case out of the Supreme Court of California shows, even police officers with the most advanced technology make mistakes that lead to unreasonable searches, seizures, and invasions upon an individual's privacy. *See People v. Robinson*, 47 Cal. 4th 1104 (January 2010). In this case, Paul Robinson was accused of committing five felony sexual offenses upon a victim in August 1994. In August 2000, four days before the six-year statute of limitations would have expired, the district attorney filed a felony complaint against "John Doe, unknown male" describing him by his unique DNA. The next day, a John Doe arrest warrant was issued, incorporating by reference the same DNA profile, and Robinson was arrested in September 2000. However, the defendant's DNA profile in the state's DNA database, which linked Robinson to the crime, had been generated from blood mistakenly collected from the defendant by local and state agencies in administering the DNA and Forensic ID Act of 1998. The act was enacted while the defendant was incarcerated, serving a sentence for felony first-degree burglary. However, an unknown prison employee completed a DNA testing form in which the defendant was mistakenly identified as a prisoner with a qualifying offense; as a result, a sample of the defendant's blood was drawn in violation of the act. In fact, both the prosecution and defense agreed that Robinson's earlier blood sample was collected in violation of the act. The defense moved to suppress the DNA evidence at trial on the basis that the federal exclusionary rule was the appropriate "remedy for the police personnel errors that occurred in this case."

Even with the district attorney stipulating that the DNA sample was taken in violation of state law, the California Supreme Court held that there was no violation of Robinson's Fourth Amendment rights because as an incarcerated convict, he did not have a valid privacy interest. However, the *Robinson* Court then conducted an in-depth analysis of *Herring* and how it would apply if the court had found a Fourth Amendment violation. The defense contended that the mistaken collection of his blood sample was the result of "a cascading series of errors" that "were indicative of a system breakdown." The *Robinson* Court rejected this argument and upheld the trial court's finding of fact that the mistakes that lead to the unlawful collection of the defendant's blood were made because "correctional staff was under pressure to immediately implement a newly enacted law that was complex and confusing." The California Supreme Court also found that the motivation for collecting the blood sample "was a good faith belief, possibly based on a negligent analysis by someone, that the defendant was a qualified offender." Based on *Herring* and *Robinson*, it follows that local police departments in California will be given significant leeway and that the result will be illegally seized evidence being admissible against defendants at trial.

Conclusion

Maintaining accurate records is a key requirement of information management. Today, the police have within their electronic reach access to an extraordinary range of databases. Mixed and mingled together are government and commercial databases filled with errors. Modern policing is a coordinated enterprise, and it is critical that a commitment to accuracy be maintained throughout the criminal-justice system. Not only does erroneous data affect the rights of citizens, but it also undermines effective investigations by creating confusion and mistakes.

Herring and technology have both contributed to sweeping changes in Fourth Amendment jurisprudence, specifically the exclusionary rule. In the modern age, where law enforcement is dependent on computers, the accuracy of government databases may determine whether a defendant gets a fair trial. When probable cause for an arrest is founded on errors in government databases, the Supreme Court has allowed evidence obtained from that search into trial. As a result, individuals are having their Fourth Amendment rights violated during the illegal seizure and again when that evidence is introduced at trial. *Herring* has shed light on the sheer volume of errors that exist in government databases. However, what *Herring* has also done is leave criminal defendants vulnerable to these errors. ■

Modern policing is a coordinated enterprise, and it is critical that a commitment to accuracy be maintained throughout the criminal-justice system.

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Fifth Amendment

continued from front cover

even though most courts will find a waiver of the Fifth Amendment privilege in only the most compelling circumstances, a defendant facing criminal prosecution who chooses to participate in the civil case must be on guard against doing anything that could constitute a waiver of constitutional rights, thus potentially aiding the government in the criminal case.

Faced with this conundrum, the conventional approach has been to seek an immediate stay of the civil proceedings. But this option may become increasingly difficult to achieve, as courts resist losing control of dockets full of cases resulting from the heightened financial-industry regulation. Furthermore, the current economic and political climate may encourage courts to give significant weight to the public interest in having these cases proceed.

There is another option, however. Clients who believe that asserting the Fifth Amendment early in civil litigation is tactically unwise should consider answering the complaint and participating in aspects of discovery in a way that does not waive the privilege. Pursuing this course would leave a defendant only to seek a stay as to testimonial discovery, which may stand a much better chance of being granted than a stay of the entire proceeding.

Not Necessarily a Waiver

For there to be a waiver of Fifth Amendment rights, a witness must have had reason to know that his or her prior statements would be interpreted as a waiver, that is, if the individual's prior statements were: (a) testimonial—voluntarily made under oath in the context of the same judicial proceeding; and (b) incriminating—directly inculpated the witness on the charges at issue. *Klein v. Harris*, 667 F.2d 274 (2d Cir. 1981). By answering a complaint, a client may not meet this test for waiver.

An Answer Should Not Be Considered a Waiver

A defendant under investigation or under indictment could consider submitting an answer and still assert the privilege later on in the litigation. This option is available because there is arguably no reasonable likelihood that the answer could distort the truth if only general denials are made. Further, a defendant could argue that there was no objective reason to know about the Fifth Amendment waiver if the answer only contained an attorney's signature because no testimony was actually given under oath, and no incriminating statements were made by the defendant.

Support for this approach is found in *Acli Int'l Commodity Services, Inc. v. Banque Populaire Suisse*. 110 F.R.D. 278, 287 (S.D.N.Y. 1986). In *Acli*, a brokerage firm brought an action against a silver trader for commodities fraud. The district court in the Southern District of New York held that filing an answer and counterclaim is not necessarily a waiver of the Fifth Amendment privilege against self-incrimination. The district court found that the answer and counterclaims were not testimonial, even if voluntary, because the statements were not made under oath, and were signed only by the defendant's counsel. Further, the district court held that the pleadings were not incriminating because all potentially incriminating statements referred only to the settlement dispute.

Although *Acli* was decided over two decades ago, it remains the seminal case. Recently, two of the defendants in the aforementioned case *SEC v. Galleon Management*, relied upon *Acli* to argue that they could answer the plaintiffs' complaint without waiving the Fifth Amendment privilege. No. 09-CV-8811 (S.D.N.Y. 2009). And other district courts in the Southern District of New York have taken positions similar to *Acli*. *See SEC v. Cayman Islands Reinsurance Corp.*, 551 F. Supp. 1056, 1057 (S.D.N.Y. 1982).

Amending the Answer

Another practical consideration is the circumstance in which the client first invokes the privilege but later decides to waive, and whether the client may then amend the answer. The rules provide that a party may amend a pleading with the opposing party's written consent or the court's leave, which "[t]he court should freely give . . . when justice so requires." Fed. R. Civ. P. 15(a)(2).

Arguably, a court would not hesitate to grant leave to amend in the event the opposing party refused to consent. However, if a court were not inclined to automatically grant leave to amend, the analysis of whether to do so would require consideration of (1) the constitutional basis for the privilege; (2) both parties' interest in resolution of the case, especially the plaintiff who brought the action in the first place; (3) judicial economy; and (4) the interests of justice—all of which weigh heavily in favor of granting leave to amend the answer. Because the privilege is a personal right and may be waived at any time, and because of the liberal approach to amending pleadings, it appears likely that a party could invoke the privilege, but later waive the privilege and amend his or her answer. As discussed below, however, the timing of subsequently waiving the privilege and amending the answer may provide the basis for the court to permit an adverse inference against the invoking party. By contrast, so long as the amended answer does not contain testimony, the amended answer would likely not constitute a waiver of the privilege.

A Testimonial Stay Is the Next Step

If the client decides to answer the complaint, a testimonial stay of discovery should be sought as a next step. A "testimonial stay" is a limited stay of discovery that covers testimonial discovery and does not include documentary evidence as a stay of all proceedings would. *See United States v. Forbes*, 150 F. Supp. 2d 672, 676 (D.N.J. 2001); *United Tech. Corp. v. Hamilton Standard Div.*, 906 F. Supp. 27, 29 (D. Mass. 1995).

In general, a court has the discretion to stay a civil case pending resolution of a related criminal action. *United States v. Kordel*, 397 U.S. 1, 12 n. 27 (1970). When deciding whether to grant a stay, a court considers several factors, such as (1) the extent to which the issues in the criminal case overlap with those presented in the civil case; (2) the status of the case, including whether a defendant has been indicted; (3) the private interests of a plaintiff in proceeding expeditiously with the civil litigation as balanced against the prejudice to a plaintiff if delayed; (4) the private

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interests of and burden on a defendant; (5) the interests of the courts; and (6) the public interest. *See Kariomona Invs. v. Weinreb*, No. 02-CV-1792, 2003 WL 9411404, at *2 (S.D.N.Y. Mar. 7, 2003); *In re Worldcom, Inc. Sec. Litig.*, Nos. 02 Civ. 3288, 02 Civ. 4816, 2002 WL 31729501, at *4 (S.D.N.Y. Dec. 5, 2002); *Sterling Nat'l Bank v. A-1 Hotels Int'l., Inc.*, 175 F. Supp. 2d 573, 576-77 (S.D.N.Y. 2001); *Jackson v. Johnson*, 985 F. Supp. 422, 424 (S.D.N.Y. 1997); *Trustee of the Plumbers and Pipefitters Nat'l Pension Fund v. Transword Mech., Inc.*, 886 F. Supp. 1134, 1139 (S.D.N.Y. 1995); *Citibank, N.A., v. Hakim*, No. 92 CIV. 6233, 1993 WL 481335, at * 1 (S.D.N.Y. Nov. 18, 1993); *Volmar Distrib. v. N.Y. Post. Co.*, 152 F.R.D. 36, 39 (S.D.N.Y. 1993). The balancing of these factors is a "case-by-case determination, with the basic goal being to *avoid prejudice*." *Volmar Distrib.*, 152 F.R.D. at 39 (emphasis added).

As a practical matter, a lawyer may also attempt to include counterclaims, both compulsory and permissive, and the production of documents in the testimonial stay. As discussed more fully below, the risk of a court finding that a defendant waived his or her Fifth Amendment privilege is much higher when asserting counterclaims and producing documents.

Counterclaims Should Be Included Within the Testimonial Stay

Counterclaims should be included within the testimonial stay because, in contrast to answering a complaint, asserting a counterclaim, whether compulsory or permissive, carries the risk that a party will be found to have waived the Fifth Amendment privilege against self-incrimination. In other words, to be even more prudent, a party may ask the court to stay the filing of counterclaims as part of the request to stay testimonial discovery.

Unlike a general denial in an answer, a counterclaim filed by one asserting the privilege is a figurative sword, allowing that party to attack the opposition while hiding behind the shield of the Fifth Amendment privilege in defense. This would provide a party with an unfair advantage, which is prohibited. *Wehling v. Columbia Broad. Sys.*, 608 F.2d 1084, 1087 (5th Cir. 1980); *Swann v. City of Richmond*, 426 F. Supp. 2d 709, 712–13 (E.D. Va. 2006); *United States v. Irish N. Aid Comm.*, 530 F. Supp. 241, 266–67 (S.D.N.Y. 1981). For purposes of a counterclaim, defendants asserting the privilege have been held to stand in the shoes of a plaintiff attempting to bring a complaint and, thus, it is within the discretion of the court to dismiss their counterclaims if they insist on asserting the privilege in defense of the complaint. *Trustees of Boston Univ. v. ASM Commc'ns, Inc.*, 33 F. Supp. 2d 66, 72 (D. Mass. 1998) (citing *Serafino v. Hasbro, Inc.*, 893 F. Supp. 104, 107 (D. Mass. 1995); *Mount Vernon Savings & Loan Assn. v. Partridge Assoc.*, 679 F. Supp. 522, 529 (D. Md. 1987); *Stop & Shop Co., Inc. v. Interstate Cigar Co., Inc.*, 110 F.R.D. 105, 108 (D. Mass. 1986). Conversely, defendants that assert their Fifth Amendment rights during discovery and trial have been allowed to proceed with their counterclaim and the presentation of evidence. *See Cont'l Assurance Co. v. Lombardo*, No. 85-4867, 1988 WL 38377, at *2 (E.D. Pa. April 11, 1988).

If a party does not assert the Fifth Amendment and wishes to pursue a counterclaim, there are other serious considerations at stake. When a party files a counterclaim, it opens the door to discovery requests pursuant to Federal Rule of Civil Procedure 26(b)(1). This rule permits a party to withhold information that is otherwise discoverable because it is privileged. Fed. R. Civ. P. 26(b)(5). While civil discovery should not be used as a "back door" to criminal discovery, "[t]he right to assert the privilege does not, *a priori*, free the claimant of the responsibility to respond in pre-trial discovery when information sought bears upon the claimant's own counterclaim and affirmative defenses." *Gen. Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1213 (8th Cir. 1973); *see also Fidelity Nat'l Title Ins. Co. of N.Y. v. Nat'l Title Res. Corp.*, 980 F.Supp. 1022 (D. Minn. 1997). The court in *General Dynamics* recognized that some counterclaims are compulsory and the failure to assert them initially bars a litigant from bringing them at a later date. The court also noted, however, that civil litigants may not disregard their duties during discovery when "questions wholly devoid of incriminatory potential should [be] answered without hesitation." However, absent a claim of privilege, the information is discoverable, and to pursue a counterclaim, a defendant would be required to submit to the rules of discovery as any other party in a civil proceeding. Thus, the defendants may not proceed with their counterclaims while at the same time significantly hindering the discovery process. *Cont'l Assurance Co.*, 1988 WL 38377, * 1 n.5. As a result, defendants may find that a trial court strikes their counterclaims and affirmative defenses for failure to submit to discovery. *Gen. Dynamics Corp.*, 481 F.2d at 1213.

A counterclaim filed by one asserting the privilege is a figurative sword, allowing that party to attack the opposition while hiding behind the shield of the Fifth Amendment privilege in defense.

With the asserted counterclaim publicly filed, the government may wish to subpoena the documents produced by the party asserting the counterclaim. If a party is only under investigation, the counterclaim and relevant documents may provide the government enough information to be able to obtain an indictment. Further, the counterclaim and subsequent discovery may alert the government to an individual's possible criminal defense, information that would not be otherwise available to the government. Disclosing any part of a defense strategy would be extremely detrimental to a defendant.

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Production of Documents

Advocates should also consider including the production of documents within any testimonial stay because of the risk of waiving the Fifth Amendment privilege. The Supreme Court stated that "the Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a Testimonial Communication that is incriminating." *Fisher v. United States*, 425 U.S. 391, 408 (1976). In *United States v. Hubbell*, the Supreme Court explained that the mere act of producing documents could have a testimonial aspect because the act itself may "implicitly communicate statements of fact." 530 U.S. 27, 36 (2000). By producing documents, the witness necessarily "admit[s] that the papers existed, were in his possession or control, and were authentic."

The determination of whether an adverse inference should be drawn is case-specific, and a district court should engage in the appropriate balancing of competing interests and factors.

Moreover, the custodian of the documents "may be compelled to take the witness stand and answer questions designed to determine whether he has produced everything demanded by the subpoena." The privilege extends to answers that "would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." "Compelled testimony that communicates information that may 'lead to incriminating evidence' is privileged even if the information itself is not inculpatory." Unlike submitting an answer, the production of documents carries the significant risk of waiving the privilege, even inadvertently. Thus, attorneys should advise their clients that it may be advantageous to seek a stay on the production of documents or assert the privilege if truly incriminating documents are in the client's possession, custody, or control.

Problems with Protective Orders

Alternatively, and depending on the jurisdiction, attorneys may have the option, albeit an extremely limited one, to seek a protective order regarding pretrial disclosures and thus avoid the need to invoke the privilege against self-incrimination.

The rules in this regard vary widely. The Second Circuit permits a protective order in a civil case to trump a grand-jury subpoena. *See Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291 (2d Cir. 1979). However, the Second Circuit has recognized there are at least three exceptions to the rule that allows a protective order to provide the same protections as the privilege against self-incrimination: (1) if the protective order is improvidently granted; (2) if reliance on the protective order is unreasonable because the order is limited on its face or is temporary; and (3) protective orders do not apply to judicial documents. *See id.*; *see also SEC v. TheStreet.com*, 273 F.3d 222, 230 (2d Cir. 2001).

The First and Third Circuits have taken the approach that there is a strong but rebuttable presumption that favors a grand-jury subpoena over a protective order in a civil case that may be overcome by a showing of exceptional circumstances. *See In re Grand Jury*, 286 F.3d 153 (3d Cir. 2002); *In re Grand Jury Subpoena*, 138 F.3d 442, 445 (1st Cir. 1998). Additionally, it is important to note that even if this option is available, a protective order is subject to modification at the discretion of the district court, and appellate review is limited to abuse of that discretion. *See The Street*, 273 F.3d at 231 (quoting *In re Agent Orange Prod. Liab. Litig.*, 821 F.2d 139, 147 (2d Cir. 1987)). By contrast, the Fourth, Ninth, and Eleventh Circuits have adopted a per se rule that a grand-jury subpoena will prevail over a protective order. *See In re Grand Jury Subpoena*, 836 F.2d 1468, 1477 (4th Cir. 1988); *In re Grand Jury Subpoena served on Meserve, Mumper & Hughes*, 62 F.3d 1222, 1226–27 (9th Cir. 1995); *In re Grand Jury Proceedings*, 995 F.2d 1013, 1020 (11th Cir. 1993).

While the First, Second, and Third Circuits theoretically permit a protective order in a civil case to prevent third-party access to the information protected, the exceptions may in fact swallow the rule. At least in the First and Third Circuits, a party would have to overcome a strong rebuttable presumption in favor of the subpoena. In the Second Circuit, a determination of whether a district court improvidently denied a protective order, thereby allowing it to be modified or vacated, would come after the fact. The parties are only protected by the order against non-parties to the litigation, and the purpose of the protective order is to allow them to testify freely. Thus, the disclosures and testimony would have already occurred at the time of appellate review, and if the order was determined to be improvident, the information would already be on the record and the privilege likely waived. In other words, it would be difficult to un-ring the bell of recorded testimony if the appellate court determined the protective order should not have been granted in the first place. Additionally, Article III documents are excluded from the rule. Therefore, if any orders or opinions referenced any information theoretically protected, that information would be in the public domain. Finally, a protective order that is temporary or limited in scope does not justify reasonable reliance by a party that it will prevail over third-party attempts to have the protective order modified or vacated. A client who sought a limited protective order would almost certainly preclude any later finding of reasonable reliance on that order.

Thus, the case law suggests that attempting to obtain a protective order that could provide the same protection as the privilege against self-incrimination would be a very risky strategy and unlikely to succeed.

Consequences of Asserting the Fifth Amendment

Coupled with the strategy of whether or not to answer, assert a counterclaim, and produce documents, attorneys should also

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evaluate the implications of invoking the privilege during later stages of the proceeding, including whether the court may permit an adverse inference to be drawn and whether there are evidentiary issues related to invocation of the privilege.

Limiting the Adverse Inference

Although it is well known that an adverse inference can be drawn against a party asserting the Fifth Amendment in a civil proceeding, the weight or the timing of such an inference is not always clear. For example, a court may decline to draw an inference if the privilege is first asserted but then waived early in the discovery phase. Further, even if a court allows the inference to be drawn, the court may not weigh that evidence particularly heavily in light of the other evidence at summary judgment or in an instruction to the jury.

Generally, an adverse inference may be drawn only when independent evidence is offered to support a fact that a party refuses to answer. *See Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976); *see also Brink's, Inc. v. N.Y.*, 717 F.2d 700, 709–10 (2d Cir. 1983). *See also Glanzer v. Glanzer*, 232 F.3d 1258, 1264 (9th Cir. 2000); *United States v. Stelmokas*, 100 F.3d 302, 311 (3d Cir. 1996). At the same time, an adverse inference cannot be drawn if silence is the response to an allegation in complaint. *Glanzer*, 232 F.3d at 1264 (citing *Nat'l Acceptance Co. v. Bathalter*, 705 F.2d 924, 930 (7th Cir. 1983). Thus, assuming *arguendo* a party invokes the privilege and remains silent, a court likely could not draw the adverse inference.

However, trial courts must also protect the opposing party's interests and ensure they are not unduly disadvantaged. *Serafino v. Hasbro, Inc.*, 82 F.3d 515, 518 (1st Cir. 1996); *see SEC v. Graystone Nash Inc.*, 25 F.3d 187, 192 (3d Cir. 1994). Considering that an adverse inference is not mandatory, the trial court has to consider whether there is a "substantial need for particular information and there is no other less burdensome effective means of obtaining it." *Serafino*, 82 F.3d at 518–19; *see Glanzer*, 232 F.3d at 1266. Additionally, the test should be applied on a case-by-case basis.

In *Brink's*, the Second Circuit affirmed admission of the claims of privilege as "competent evidence *under the circumstances of this case*. . . ." *Brink's*, 717 F.2d at 710 (emphasis added); *see LiButti v. United States*, 107 F.3d 110, 121 (2d Cir. 1997). Thus, the determination of whether an adverse inference should be drawn is case-specific, and a district court should engage in the appropriate balancing of competing interests and factors.

For example, the Second Circuit recognized that "litigants denied discovery based upon an assertion of the privilege may ask the court or trier of fact to draw a negative inference from the invocation of the right." *SEC v. Hirshberg*, 173 F.3d 843, *2 (2d Cir. 1999) (table). The court explained that "[i]f at a subsequent stage in the litigation the party asserting the privilege seeks to change course and waive it, we consider the nature of the proceeding, how and when the privilege was invoked, and the potential for harm or prejudice to opposing parties in determining an appropriate outcome." The court approved barring a litigant from

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later testifying if the request to waive comes at the "eleventh hour and appears to be part of a manipulative, 'cat-and-mouse approach' to the litigation." In *Hirshberg*, the defendants invoked the privilege in March 1987. *Id.* In 1992, four years after the SEC's motion for summary judgment had been filed, the defendants sought to waive the privilege and introduce an affidavit and SEC testimony. The court upheld the district court's decision to preclude the testimony as "precisely the type of 'eleventh hour' and 'manipulative, cat-and-mouse approach' to the use of the Fifth Amendment privilege" that the court had previously warned against.

Many district courts seem to contemplate the use of the adverse inference only after parties are well into discovery. For example, the district court in *Cablevision Systems Corp. v. De Palma*, considered drawing an adverse inference at the defendant's deposition. No. CV-87-3528, 1989 WL 8165, *5 (E.D.N.Y. Jan. 17, 1989); *see also Penfield v. Venuti*, 589 F.Supp. 250, 255 (D. Conn. 1984). Some district courts have reserved ruling on the issue of whether an adverse inference should be drawn until trial. *See In re WorldCom, Inc. Sec. Litig.*, No. 02-CV-3288, 2005 WL 375315 (S.D.N.Y. Feb. 17, 2005; *Wechsler v. Hunt Health Sys., Ltd.*, No. 94-CV-8294, 2003 WL 21998980 (S.D.N.Y. Aug. 22, 2003); *see also SEC v. DiBella*, No. 3:04-CV-1342, 2007 WL 1395105 (D. Conn. May 8, 2007). Other courts have held that the earliest such an inference can be drawn is during summary judgment. In *National Acceptance Co. v. Bathalter*, the Seventh Circuit specifically prohibited drawing the adverse inference during the pleading stage. 705 F.2d 924, 930 (7th Cir. 1983). Thus, when weighing the benefits and the costs of asserting the privilege early in the litigation, parties should consider when during the litigation the adverse inference will be drawn by the court.

Moreover, whether a court should draw an adverse inference is certainly not a foregone conclusion. For example, the Ninth Circuit explained that the "assertion of the privilege necessarily attaches only to the question being asked and the information sought by that particular question." *Glanzer*, 232 F.3d at 1265. Accordingly, any permissible adverse inference must relate only to the answer to which the privilege is invoked. The court observed that, similar to other evidentiary inquiries, whether an adverse inference is permissible begins with a consideration of relevance and whether the probative value is substantially outweighed by the prejudicial effect. Further, a district court in the Southern District of New York denied the defendants' motion in limine for a negative inference. *Wechsler v. Hunt Health Sys., LTD.*, No. 94 Civ. 8294, 2003 WL 21998980 (S.D.N.Y. Aug. 22, 2003). The invocation occurred during the witness's deposition, and the district court concluded that it required further information as to whether the test for an adverse inference for a non-party had been satisfied. *Id.* at *3. Finally, the Seventh Circuit reiterated that the inference "*may* be drawn, but it does not necessarily need to be drawn." *Daniels v. Pipefitters' Ass'n Local Union*, 983 F.2d 800, 802 (7th Cir. 1993).

If a party invokes the privilege initially, but waives at an early stage of discovery, there is a strong argument that the original invocation would not be relevant or probative of any fact in issue.

Further, even if the adverse inference is admissible, a court should analyze the admissibility of the evidence under Rule 403. *Brink's*, 717 F.2d at 710; *see also* Fed. R. Evid. 403. The Fifth Circuit determined that "[t]he potential prejudice in revealing the invocation of the Fifth Amendment is high, because the jury may attach undue weight to it, or may misunderstand [a person's] decision to invoke his constitutional privilege." *Harrell v. DCS Equip. Leasing Corp.*, 951 F.2d 1453, 1464–65 (5th Cir. 1992); *see Farace v. Indep. Fire Ins. Co.*, 699 F.2d 204, 209–11 (5th Cir. 1983).

If a party invokes the privilege initially, but waives at an early stage of discovery, there is a strong argument that the original invocation would not be relevant or probative of any fact in issue. This argument is bolstered by the fact that, at that time, the party will have amended the answer and submitted to all discovery requests. For instance, the Seventh Circuit reversed a district court decision excluding presentation of evidence regarding a defendant's invocation of the privilege that the court presumed the district court excluded under Rule 403. *See Harris v. Chicago*, 266 F.3d 750 (7th Cir. 2001). The Seventh Circuit explained that whether exclusion under Rule 403 is proper requires consideration of the timing of abandonment of the privilege claim. If the privilege claim is abandoned earlier rather than later in a proceeding, the probative value may be very low.

Thus, whether a court draws the inference or so instructs the jury, the inference still must be considered along with the other evidence against the party. That said, if a party invokes the privilege throughout the litigation, a court would likely allow the adverse inference to be drawn. By contrast, if a party invokes initially but waives during the early stages of discovery, especially before a deposition, the balancing of interests may weigh in favor of the court declining to draw the inference.

The Effect of Federal Rule of Evidence 801

A party should also be aware that the invocation of the Fifth Amendment privilege could constitute an admission or a prior inconsistent statement. Rule 801(d)(2)(A) provides that a statement is not hearsay if "[t]he statement is offered against a party and is . . . the party's own statement, in either an individual or representative capacity."

The Eighth Circuit held that, "[a] pleading abandoned or superseded through amendment no longer serves any function in the case, but may be introduced into evidence as the admission of a party."

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Sunkyong Int'l, Inc. v. Anderson Land & Livestock Co., 828 F.2d 1245, 1249 n.3 (8th Cir. 1987). However, the Seventh Circuit in *National Acceptance Co.* prohibited use of invocation of the privilege in response to a complaint as an admission of the allegations. 705 F.2d at 930. Because the admission would be the invocation, it is not clear how either of these cases resolves the issue.

Rule 801(d)(1)(A) permits prior inconsistent statements to be introduced as substantive evidence. For a prior invocation of privilege to be a prior inconsistent statement, the declarant must testify, be subject to cross-examination, and the inconsistent statement must have been made under oath. Fed. R. Evid. 801(d)(1)(A). A witness who asserts the privilege while testifying at trial may not be considered "subject to cross-examination" within the meaning of the rule. *See United States v. Fiore*, 443 F.2d 112, 115 (2d Cir. 1971); *see also* 5 J. Weinstein and M. Berger, *Weinstein's Evidence* § 801.20[2] (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 2010). However, if a witness asserted the privilege at a deposition and then testified at trial, and the statement was considered inconsistent, it could potentially be introduced as nonhearsay evidence.

Impeachment Evidence

Although some authority suggests that claiming the privilege is not impeachment evidence, the Supreme Court has recognized instances where it was a permissible use of the evidence. *See* 4 J. Weinstein and M. Berger, *Weinstein's Evidence* § 608.30[3] (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 2010). For example, in *Raffel v. United States*, the Court held that it was not error for a criminal defendant to be cross-examined on the invocation of the privilege during his or her first trial on the same charges. 271 U.S. 494 (1926). A defendant who takes the witness stand may be cross-examined within the limits of the appropriate rules. An adverse inference may be drawn based on the witness's failure to explain incriminating evidence. However, the Court conceded that if "the defendant had not taken the stand on the second trial, evidence that he had claimed the same immunity on the first trial would be probative of no fact in issue, and would be inadmissible."

In *Jenkins v. Anderson*, the Court held that "the Fifth Amendment is not violated by the use of pre-arrest silence to impeach a criminal defendant's credibility." 447 U.S. 231, 238 (1980). The Court explained that "impeachment follows the defendant's own decision to cast aside his cloak of silence and advances the truth-finding function of the criminal trial." By contrast, the Court had previously recognized that "prior silence cannot be used for impeachment where silence is not probative of a defendant's credibility and where prejudice to the defendant might result." *Id.* at 239 (citing United States v. Hale, 422 U.S. 171, 180–81 (1975), *Stewart v. United States*, 366 U.S. 1, 5 (1961), *Grunewald v. United States*, 353 U.S. 391, 424 (1957)). Relying on its supervisory power, the Court in *Grunewald* held that under the circumstances of the case, "it was prejudicial error for the trial judge to permit cross-examination of petitioner on his plea of the Fifth Amendment privilege before the grand jury. . . ." 353 U.S. at 424. Additionally, in a criminal proceeding, the Second Circuit has held that "a witness's invocation of his Fifth Amendment privilege was not inconsistent with his later exculpatory testimony at trial and thus that the prosecution should not have been allowed to introduce evidence of the invocation on cross-examination." *Brink's, Inc.*, at 709 (citing *United States v. Tomaiolo*, 249 F.2d 683, 690–92 (2d Cir. 1957). One point to note is that because a witness may be impeached on direct examination, questioning by counsel could mitigate any potential sting of the anticipated impeachment on cross-examination. Fed. R. Evid. 607.

Although some authority suggests that claiming the privilege is not impeachment evidence, the Supreme Court has recognized instances where it was a permissible use of the evidence.

If the privilege is not claimed for an extensive period of the litigation, or the party who invokes submits to deposition testimony without claiming the privilege, arguably the potential impeachment costs could be ameliorated through direct examination if necessary. Thus, although it is far from clear how the rules of evidence later impact invocation of the privilege, there is at least the possibility that invocation of the privilege in a civil case may be potential impeachment evidence against the invoking party when that person testifies at trial.

Conclusion

There are many variables that counsel should consider when considering the assertion of the Fifth Amendment privilege against self incrimination. Given the significant consequences any of these decisions may have on either a civil or criminal proceeding, it is important to understand fully the extent and uncertainty of the law in this area. ■

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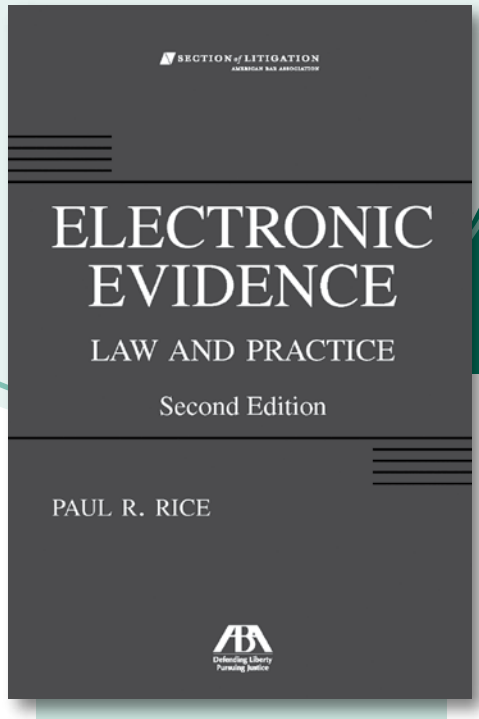

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