

Fordham Law School  
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## **WHITE COLLAR CRIMINAL INVESTIGATIONS AND PARALLEL CIVIL PROCEEDINGS**

Today, every high profile criminal matter – whether Harvey Weinstein, Rajaratnam or Volkswagon – involves parallel civil litigation, such as an SEC enforcement action, a state attorney general lawsuit, a private class action or a tort claim. For many defendants caught up in a criminal investigation, the consequences of companion civil litigation or regulatory proceedings may be as serious as the criminal investigation; companies may be barred from lines of business, or put out of business entirely, and individuals may face loss of a law, accounting or securities license.

Although criminal and civil law are traditionally separate disciplines, increasingly, the line between those disciplines has blurred. Criminal penalties may be monetary and involve restitution to victims, who are often private parties. Strict liability criminal statutes require no *mens rea*. These are more than definitional or theoretical issues, and this seminar explores the practical problems that arise at the crossroads of criminal and civil law.

No lawyer can competently represent a client confronting cases at these crossroads without analyzing the ramifications of an action taken in one context for the other. What are the consequences, for a related civil case, of asserting Fifth Amendment rights in the context of a criminal prosecution? What are the consequences, for related civil litigation, of entering a guilty plea in a criminal proceeding? Can a party provide the government with an internal investigation report, but withhold that report from adversaries in civil discovery?

This class addresses these issues, taking into account perspectives of the court, government prosecutors and regulators, and private civil and criminal counsel.

### **Week 1: Introduction to the Theoretical Framework and Practical Problems**

#### **A. Traditional conceptual differences**

private versus public wrongs; remedies, restitution and victims' rights; corporate criminal liability, RICO

#### **B. Common procedural settings**

street crimes and white collar crimes

simultaneous proceedings by different branches of the government.

how does the government decide if a matter is criminal or civil?  
*United States v. Goyal*, 629 F.3d 912 (9<sup>th</sup> Cir. 2010)

C. Practical problems

defending in multiple forums  
concurrent criminal and civil jurisdiction  
civil investigative demands and administrative subpoenas  
balancing issues relating to discovery and privilege

**Week 2: Strategies in Parallel Criminal and Civil Cases**

What is the effect of collateral estoppel and how does that drive litigation strategy?

A. *In re Adelpia Communications Corp.*, 2006 WL 2463355 (S.D.N.Y. Aug. 23, 2006)

B. *SEC v. Monarch Funding Corp.*, 192 F.3d 295 (2d Cir. 1999)

**Week 3: Case Study: The many civil and criminal proceedings relating to Pfizer's drug Bextra**

This case study touches on almost every issue in the class. The readings discuss criminal cases, civil cases brought by states and the federal government, a *qui tam* action, a shareholder derivative lawsuit and products liability actions.

A. Consolidated, Amended and verified Shareholder Derivative Complaint *In re Pfizer Shareholder Derivative Action*, 09-CV-7822 (JSR) (S.D.N.Y. Nov. 18, 2009)

B. Press Release, USAO, District of Massachusetts, June 18, 2009

C. Bextra and Celebrex Settlement, Settlement Information Website, <http://www.bextracelebexsettlement.com>

D. Griffin and A. Segal, *Feds found Pfizer too big to nail*, CNN.com <http://www.cnn.com/2010/HEALTH/04/02/pfizer.bextra/index.html>

**Week 4: Basic background: The Importance of Cooperation, and its implication for the Government, a Company and Company Employees**

A. *United States Attorneys' Manual*, 9-28.720

B. *United States v. Stein*, 541 F.3d 130 (2d Cir. 2008)

**Week 5: The Blurred Line between Criminal and Civil law**

The line between criminal and civil law blurs when criminal liability can be imposed even absent *mens rea*. And how can corporations, which are legal “persons”, ever have criminal intent?

- A. *United States v. De Coster*, \_\_\_ F.3d \_\_\_, No. 15-1890 (8<sup>th</sup> Cir., July 6, 2016)
- B. P. Henning, *Making it Harder to Prove White-Collar Crimes*, The New York Times, November 30, 2015.
- C. *United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1993) (en banc)
- D. *Commonwealth v. Life Care Center*, 456 Mass. 826 (2010)

**Week 6: “Parallel” Civil and Criminal Proceedings**

Often the government brings criminal and civil actions relating to the same transaction. Federal securities laws is an area in which such parallel proceedings often arise. At other times, the government brings criminal charges and a private party brings a civil action relating to the same transaction. Sometimes the civil action follows the criminal one and sometimes it precedes or instigates the criminal action.

- A. *SEC v. FTC Capital Markets*, 2010 WL 2652405 (S.D.N.Y. June 30, 2010)
- B. *Luis v. United States*, Case No. 14-419, Transcript of Oral Argument, United States Supreme Court, November 10, 2015.
- C. *Luis v. United States*, 578 U.S. \_\_\_ (March 30, 2016)
- D. *United States Attorneys’ Manual*, Section 932

**Week 7: Constitutional Issues**

Does a party faced with what can be an overwhelming onslaught of litigation have any constitutional protection?

- A. *United States v. Scrushy*, 366 F.Supp. 2d 1134 (N.D.Ala. 2005)
- B. *United States v. Stringer*, 408 F.Supp. 2d 1083 (D. Or. 2006)
- C. *United States v. Stringer*, 535 F.3d 929 (9<sup>th</sup> Cir. 2008)
- D. SEC Form 1662

**Week 8: The Fifth Amendment Privilege Against Self-Incrimination**

One of the most difficult tactical problems parallel proceedings raise is whether or not to invoke the privilege against self-incrimination. Can a witness simultaneously invoke the privilege and claim innocence? What are the consequences of invoking the privilege?

- A. *Ohio v. Reiner*, 532 U.S. 17 (2001)
- B. *Baxter v. Palmigiano*, 425 U.S. 308 (1976)
- C. *Steiner v. Minnesota Life Ins. Co.*, 85 P.3d 135 (Colo. 2004) (*en banc*)
- D. *La Salle Bank v. Seguban*, 54 F.3d 387 (7<sup>th</sup> Cir. 1995)

**Week 9: More Readings On The Fifth Amendment Privilege**

What happens when an employer coerces cooperation?

- A. *Garrity v. New Jersey*, 385 U.S. 493 (1967)
- B. *Spevack v. Klein*, 385 U.S. 411 (1967)
- C. *D.L. Cromwell Investments, Inc. v. NASD Regulation, Inc.*, 279 F.3d 155 (2d Cir. 2002)
- D. *United States v. Connolly and Black*, 16-CR-370 (CM)  
October 5, 2018 Letter from the government to the court.

**Week 10: Practical Considerations In Connection with Invoking The Fifth Amendment**

How does one invoke the privilege? What showing does one have to make to claim protection?

- A. *United States v. Morganroth*, 718 F.2d 161 (6<sup>th</sup> Cir. 1983)
- B. *Rad Services, Inc. v. Aetna Casualty*, 808 F.2d 271 (3<sup>rd</sup> Cir. 1986)
- C. *Brink's Inc. v. City of New York*, 717 F.2d 700 (2d Cir. 1983)
- D. *United States v. Tuzman*, 15 Cr. 536 (PGG), (S.D.N.Y. Nov. 27, 2017)
- E. *Libutti v. United States*, 107 F.3d 110 (2d Cir. 1997)

**Week 11: Discovery Issues Other Than Fifth Amendment Questions**

Parallel proceedings raise a host of other discovery issues as well. What are the consequences of a private party's sharing documents with the government? Conversely, what are the consequences of a prosecutor disclosing material to a criminal defendant?

- A. Document production and the selective waiver doctrine  
*In re Pacific Pictures Corp.*, 679 F.3d 1121 (9<sup>th</sup> Cir. 2012)
- B. Wiretaps  
*SEC v. Rajaratnam*, 622 F.3d 159 (2d Cir. 2010)
- C. Civil protective orders and criminal investigations  
*In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes*, 62 F.3d 1222 (9th Cir. 1995)

**Week 12: Other Discovery and Evidentiary Issues**

- A. Grand Jury Materials  
*In re Air Cargo Shipping Services Antitrust Litigation*, 06-MD-01775 (JG) (VVP) United States District Court, Eastern District of New York
- B. *Brady* Issues  
*United States v. Martoma*, 12 Cr. 973 (PGG), 2014 U.S. Dist. LEXIS 566

(S.D.N.Y. Jan. 5, 2014)

- C. Can a party in a civil trial comment on an adversary's failure to testify at an earlier, related criminal trial?

*Patrick v. City of Chicago*, No. 14-cv-3658 United States District Court, N. D. Illinois, March 21, 2017.

**Week 13: Stay of Civil Proceedings**

Parties seek to avoid the privilege and discovery issues we have been discussing by seeking a stay of the parallel civil proceeding. Sometimes the government seeks a stay. In other cases, private litigants seek to stay civil discovery.

What circumstances might cause a private litigant to seek a stay? When might the government want to stay a parallel civil action? Some courts have questioned the fairness of the government's commencing simultaneous parallel actions and moving to stay civil discovery. Is there a rule that courts should follow in deciding these issues, or should such motions to stay be decided on a case-by-case basis because they are too fact-specific?

- A. *SEC v. Nicholas*, Case No. SACV 08-539-CJC (RNB)  
United States District Court, Central District of California,  
William J. Ruehle's Opposition to The Government's  
Motion to Stay Discovery
- B. *SEC v. Meli*, Case No. 17-cv-632-LLS United States District  
Court, Southern District of New York, Defendants' Motion to Stay
- C. *SEC v. Meli*, Case No. 17-cv-632-LLS United States District  
Court, Southern District of New York, SEC's Response to Defendants'  
Motion to Stay