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### Summary of Aspen Financial Services Inc. v. Dist. Ct., 128 Nev. Adv. Op. 57

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## CIVIL PROCEDURE – WRIT OF PROHIBITION OR MANDAMUS

### **Summary**

The Court considered a petition for a writ of prohibition or mandamus in response to a district court's denial of a motion to stay certain testimonial discovery in a civil proceeding occurring simultaneously to a criminal investigation.

### **Disposition/Outcome**

Although the district court has the power to stay a civil proceeding in the interest of fairness, it is constitutionally permissible for both a civil proceeding and a criminal investigation to proceed concurrently. Ultimately, the district court's determination regarding whether a stay is warranted is a discretionary decision that comes at the end of a careful balancing of the interests involved.

### **Factual and Procedural History**

Plaintiffs suffered substantial losses from investments they made with defendant-petitioners. Believing the losses to be a result of fraud, plaintiffs brought suit against petitioners in district court. Additionally, and at the behest of plaintiffs, the F.B.I. initiated a criminal investigation of petitioners for their alleged fraudulent activities. Petitioners filed a motion to stay any depositions and written discovery in the civil proceeding that would require any of their employees or representatives to make testimonial statements. The district court denied the motion without prejudice, and petitioners asked the Court for a writ of mandamus or prohibition directing the district court to grant the stay.

### **Discussion**

Justice Saitta wrote the unanimous opinion for the Court sitting en banc.

While writs are generally not available to review discovery orders,<sup>2</sup> in some narrow instances, writ relief may be available when it is necessary to prevent discovery that would cause privileged information to irretrievably lose its confidential nature.<sup>3</sup> Accordingly, the Court considers the writ petition because, absent a stay, the petitioners would have to choose between

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<sup>1</sup> By Oscar Peralta.

<sup>2</sup> *Valley Health Sys. v. Dist. Ct.*, 127 Nev. \_\_, \_\_ n.5, 252 P.3d 676, 678 (2011).

<sup>3</sup> *Id.* at \_\_, 252, P.3d at 678-679.

waiving their Fifth Amendment privilege in the civil deposition and risk revealing information to criminal investigators,<sup>4</sup> or invoke the privilege and lose the ability to deny allegations against them.<sup>5</sup>

The district court's denial of the motion to stay the civil proceedings is reviewed for an abuse of discretion because "[d]etermining how to proceed in response to a civil litigant's request for accommodation of his or her Fifth Amendment privilege against self-incrimination is a matter within the discretion of the district court."<sup>6</sup> Despite petitioners' claim that they would be unable to defend themselves if the stay was not granted and their employees or representatives were forced either to testify or to raise their Fifth Amendment privilege, the district court acted well within its discretion in determining that the stay was unnecessary.

While the Fifth Amendment privilege can be raised in both criminal and civil proceedings,<sup>7</sup> a predicament arises when the same transactions or issue give rise to parallel civil and criminal actions. On the one hand, the civil proceeding can vitiate the protections afforded the accused in the criminal proceeding if the prosecutor can use information obtained from him through civil discovery.<sup>8</sup> On the other hand, the criminal proceeding can impede the search for truth in the civil proceeding if the accused asserts his privilege against self-incrimination.<sup>9</sup> To resolve this dilemma, the Court has instructed district courts to, upon timely motion, balance the divergent interests implicated when a civil litigant invokes the Fifth Amendment.<sup>10</sup>

The specific accommodation of a stay of civil proceedings is addressed by the Court for the first time in this case, so the Court looked to other jurisdictions for guidance. The Court noted that "a defendant has no constitutional right to a stay simply because a parallel criminal proceeding is in the works."<sup>11</sup> A stay "is an extraordinary remedy appropriate for extraordinary circumstances."<sup>12</sup> Thus, "[a] movant must carry a heavy burden" in order to demonstrate that a stay is warranted.<sup>13</sup> Determining whether to grant a stay of civil proceedings during the pendency of criminal proceedings is a fact-intensive, case-by-case determination that requires a delicate balancing of the "competing interests involved in the case."<sup>14</sup>

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<sup>4</sup> See *Volmar Distrib. v. N.Y. Post Co.*, 152 F.R.D. 36, 39-40 (S.D.N.Y. 1993).

<sup>5</sup> *Id.* at 39.

<sup>6</sup> *Francis v. Wynn Las Vegas*, 127 Nev. \_\_, \_\_, 262 P.3d 705, 710 (2011).

<sup>7</sup> *Id.* at \_\_, 262 P.3d at 711.

<sup>8</sup> *Milton Pollack, Sr. J.*, U.S. Dist. Ct., S.D.N.Y., *Parallel Civil and Criminal Proceedings*, 129 F.R.D. 201, 202 (Oct. 17-19, 1989).

<sup>9</sup> *Id.*

<sup>10</sup> *Francis*, 127 Nev. at \_\_, 262 P.3d at 711.

<sup>11</sup> *Microfinancial, Inc. v. Premier Holidays Intern.*, 385 F.3d 72, 77-78 (1st Cir. 2004).

<sup>12</sup> *Weil v. Markowitz*, 829 F.2d 166, 174 n.17 (D.C. Cir. 1987).

<sup>13</sup> *Microfinancial*, 385 F.3d at 77.

<sup>14</sup> *Fed. Sav. & Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 902 (9th Cir. 1989).

The Court followed the framework set forth by the Ninth Circuit Court of Appeals for analyzing whether to grant such a stay. Under the framework, courts should analyze “the extent to which the defendant’s Fifth Amendment rights are implicated,”<sup>15</sup> as well as the following nonexhaustive factors:

- (1) The interest of the plaintiffs in proceeding expeditiously with [the] litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay;
- (2) the burden which any particular aspect of the proceedings may impose on defendants;
- (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources;
- (4) the interests of persons not parties to the civil litigation; and
- (5) the interest of the public in the pending civil and criminal litigation.<sup>16</sup>

The Court applied the Ninth Circuit test to the instant case.<sup>17</sup> First, the extent to which a party’s Fifth Amendment privilege is implicated is generally determined by reference to the overlap between the civil and criminal cases and the status of the criminal matter.<sup>18</sup> The Court found significant overlap between the subjects of the civil lawsuit and the criminal investigation, as they both involved the same financial activities by petitioners. Turning to the status of the criminal proceeding, the Court noted that the need for a stay is “far weaker” when, as in this case, “[n]o indictment has been returned.”<sup>19</sup> As a general rule, preindictment requests for a stay are denied “because there is less risk of self-incrimination, and more uncertainty about the effect of a delay on the civil case.”<sup>20</sup> The touchstone for evaluating a preindictment motion to stay is considering whether “special circumstances” justify granting a stay despite the absence of an indictment, such as when a formal indictment is “an eventuality”<sup>21</sup> or when the government has initiated the civil proceeding and also controls the simultaneous criminal investigation.<sup>22</sup>

The Court found that while the plaintiffs were providing criminal investigators with discovery obtained in their civil action, this is quite different from a situation in which the government is a party in parallel criminal and civil proceedings.<sup>23</sup> The Court, furthermore, found no support from the record that the prosecutors sought control of civil discovery or that the interaction was improper.

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<sup>15</sup> Keating v. Office of Thrift Supervision, 45 F.3d 324 (9th Cir. 1995). (quoting *Molinaro*, 889 F.2d at 902).

<sup>16</sup> *Id.*

<sup>17</sup> The Court stated that while the district court did not expressly analyze each of these factors, the transcript of the hearing demonstrates that the court did consider the relevant factors.

<sup>18</sup> *Alcala v. Texas Webb County*, 625 F. Supp. 2d 391, 400 (S.D. Tex. 2009).

<sup>19</sup> *Sec. & Exch. Comm'n v. Dresser Indus.*, 628 F.2d 1368, 1376 (D.C. Cir. 1980).

<sup>20</sup> *Walsh Sec. v. Cristo Prop. Mgmt.*, 7 F. Supp. 2d 523, 527 (D. N.J. 1998).

<sup>21</sup> *See, e.g., Chao v. Fleming*, 498 F. Supp. 2d 1034, 1039 (W.D. Mich. 2007) (internal quotation marks omitted).

<sup>22</sup> *See, e.g., S.E.C. v. Healthsouth Corp.*, 261 F. Supp. 2d 1298, 1326 (N.D. Ala. 2003).

<sup>23</sup> *Sterling Nat. Bank v. A-1 Hotels Intern., Inc.*, 175 F. Supp. 2d 573, 579 (S.D.N.Y. 2001).

In considering the plaintiffs' interests and potential prejudice, the Court observed that plaintiffs have "an obvious interest in proceeding expeditiously."<sup>24</sup> The delay resulting from a stay may also "duly frustrate a plaintiff's ability to put on an effective case" because as time elapses, "witnesses become unavailable, memories of conversations and dates fade, and documents can be lost or destroyed."<sup>25</sup> The stay may also impede the plaintiffs' ability to obtain "negative inferences" from defendants' refusal to testify.<sup>26</sup> Thus, the prejudice that a stay would pose on the plaintiffs is acute.

Next, the Court considered the burdens on the defendants. The primary burden posed by denying the stay and proceeding with both actions is the danger in undermining a defendant's Fifth Amendment privilege against self-incrimination. If the defendant asserts the privilege, she is unable to defend her position, and raises negative inferences from her refusal to testify; if the defendant testifies, she effectively waives her privilege and all the information she provides can later be used against her in a criminal proceeding.<sup>27</sup> In addition, a defendant testifying in a civil action may inadvertently "reveal[] his weak points to the criminal prosecutor,"<sup>28</sup> may have to divert resources needed for his criminal defense,<sup>29</sup> and may help broaden the scope of criminal discovery.<sup>30</sup> The Court found that while these are heavy burdens, they are largely conjectural, as it is not possible to predict the length of the criminal investigation, or whether it will lead to an indictment. While the Court did not take the burdens the defendants may face lightly, there was only a faint probability that these dangers would be manifested.

The Court then turned to the district court's interest in convenience and efficiency, which is "deserving of substantial weight."<sup>31</sup> This interest "is best served when motions to stay proceedings are discouraged."<sup>32</sup> The Court stated that "a policy of freely granting stays solely because a litigant is defending simultaneous multiple suits would threaten to become a constant source of delay and an interference with judicial administration."<sup>33</sup> The fact the no indictments have been issued would make a stay indefinite and protracted and would thus interfere with the Court's interest in managing its caseload expeditiously, which is intensified in complex litigation.<sup>34</sup> The Court also found that although petitioners emphasized that they only sought to

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<sup>24</sup> *Microfinancial, Inc.*, 385 F.3d at 78.

<sup>25</sup> *Alcala*, 625 F. Supp. 2d at 405.

<sup>26</sup> *In re CFS-Related Securities Fraud Litigation*, 256 F. Supp. 2d 1227, 1239 (N.D. Okla. 2003).

<sup>27</sup> *Volmar Distrib.*, 152 F.R.D. at 39-40 (citations omitted).

<sup>28</sup> *Afro-Lecon, Inc. v. U.S.*, 820 F.2d 1198, 1203 (Fed. Cir. 1987).

<sup>29</sup> *White v. Mapco Gas Prod., Inc.*, 116 F.R.D. 498, 502 (E.D. Ark. 1987).

<sup>30</sup> *King v. Olympic Pipeline Co.*, 16 P.3d 45, 58 (Wash. Ct. App. 2000).

<sup>31</sup> *Microfinancial, Inc.*, 385 F.3d at 79.

<sup>32</sup> *U.S. v. Private Sanitation Indus. Ass'n*, 811 F. Supp. 802, 808 (E.D.N.Y. 1992).

<sup>33</sup> *Paine, Webber, Jackson & Curtis, Inc. v. Malon S. Andrus, Inc.*, 486 F. Supp. 1118, 1119 (S.D.N.Y. 1980).

<sup>34</sup> *In re CFS-Related Securities Fraud Litigation*, 256 F. Supp. 2d at 1241.

stay certain depositions, those were central to the case, and would all but grind the case to a halt.<sup>35</sup>

Finally, after finding that the case does not implicate the interests of any nonparties, the Court addressed the interest of the public in the civil and criminal matters. The Court noted that the public has an interest in the prompt resolution of cases,<sup>36</sup> particularly claims brought to remedy the “[d]issemination of false or misleading information by companies to members of the investing public.”<sup>37</sup> Because the present case involved claims of a large-scale real estate scam, the Court found that the public has an undoubtedly strong interest in rooting out such activity as quickly as possible. Thus, the delay flowing from a stay would shake the public’s confidence in the administration of justice.

### **Conclusion**

The district court did not abuse its discretion in determining that, on balance, the interests of the defendants in a stay do not outweigh the countervailing interests involved, and thus the writ petition was denied.

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<sup>35</sup> See *Sterling Nat. Bank*, 175 F. Supp. 2d at 579 (noting that even when a party seeks to stay only “particular depositions,” such relief “effectively stops the case in its tracks”).

<sup>36</sup> *Microfinancial*, 385 F.3d at 79 n.4 (citing FRCP 1, the federal counterpart to NRCP 1).

<sup>37</sup> *Dresser Indus.*, 628 F.2d at 1377.