PARALLEL PROCEEDINGS: CONCURRENT QUI TAM AND GRAND JURY LITIGATION

I. INTRODUCTION

Increasingly, health care providers find themselves thrust into complex civil and criminal proceedings as unwilling defendants. Federal *"qui tam"* lawsuits under the False Claims Act ("FCA"),[1] for example, often lead to federal law enforcement involvement and may lead to related criminal investigations and prosecution. Whether related criminal and civil proceedings advance concurrently or consecutively, unique procedural and substantive issues are presented. Concurrent or consecutive progression of a pending *qui tam* action and grand jury investigation, for example, raises several issues in a variety of areas, including: 1) discovery, 2) assertion and maintenance of applicable privileges, 3) collateral estoppel effects of judicial rulings, and 4) plea and settlement negotiations. The importance of these considerations is multiplied by the possibility of additional proceedings likely to be initiated, either contemporaneously with or subsequent to those already pending. Additional proceedings might include administrative proceedings (e.g., suspension, debarment hearings, and licensing board discipline) and/or private civil suits.

To respond to the issues raised by concurrent or consecutive proceedings, a provider and its counsel must endeavor to discover the nature and scope of the government investigation, while simultaneously scrutinizing that investigation to ensure that it is conducted properly. A provider must exploit its own opportunities to learn about the investigation, while attempting to limit the government's access to information which is in the provider's interest to voluntarily disclose and to which the government is

---

1. 31 U.S.C. §§ 3729-3731 (1994 & Supp. III 1997). The False Claims Act provides that private parties may bring civil suits for fraud against the federal government on the government's behalf. The incentive for doing so is a percentage (up to 30%) of the ultimate recovery of treble damages, fines, and penalties. 31 U.S.C.A. § 3730(b), (d)(1)-(2) (West Supp. 1999).

entitled. By evaluating the relevant issues and analyzing them in the context of a hypothetical, this Article demonstrates that a provider under investigation should seek a "global settlement" of all parallel and related governmental matters, while at the same time staying any related civil actions in which the government is not involved. Such a settlement should include all possible federal and state criminal, civil *qui tam*, and administrative liability. Resolving all potential liability with relevant governmental authorities must be done carefully, protecting all applicable privileges and structuring the settlement to limit its collateral estoppel effects.

II. THE HYPOTHETICAL[2]

On October 17th, 1997, a federal search warrant was executed on Community Hospital's business office premises. Documents and computers were seized, employees were questioned, and confusion reined. Through contact with the United States Attorney, counsel for Community Hospital subsequently learned that an on-going grand jury investigation was the catalyst for the search. That investigation focuses on probable violations of the anti-kickback statute[3] relating to a contract with Cancer Radiology Associates ("CRA"), an independent medical service provider that leases space in the Community Hospital complex. Counsel has also learned that Community Hospital Vice President Bernard Brown, among others, is a target of the grand jury investigation and that Brown intends to testify before the grand jury to "clear things up." It seems the criminal investigation likely grew out of a lawsuit filed by Jane Doe, an employee of Community Hospital, under the civil FCA, i.e., a *qui tam* lawsuit. However, the complaint forming the basis of that action is still under seal.

---

2. This hypothetical grew out of facts created by Pamela H. Bucy, Frank M. Bainbridge Professor of Law, for a business crimes seminar course at The University of Alabama School of Law.

3. 42 U.S.C. § 1320a-7b(b) (1994 & Supp. III, 1997).

III. POTENTIAL TYPES OF PROCEEDINGS

When an individual such as Jane Doe initiates a *qui tam* action against an entity such as Community Hospital, the government has an opportunity to review the complaint(s) to determine whether to intervene in the action.[4] In doing so, the government may find probable cause of criminal wrongdoing sufficient to obtain a search warrant and convene a grand jury. By then initiating a grand jury investigation, the government begins a proceeding "parallel" to the pending civil *qui tam* action.[5] There is also the possibility, for other actions to be brought against an entity such as Community Hospital.[6]

A. Suspension of Government Contracts

The Department of Health and Human Services ("DHHS") may initiate proceedings to suspend a health care provider from government contracting, with debarment hearings possibly following.[7] If suspended, all payments due to the provider for services rendered to Medicare patients would be withheld until the amount in dispute is ascertained.[8] Then, amounts due for uncontested services would be paid, but no payments would be made for any services rendered to Medicare patients after the date of suspension.[9] Normally, there wouldbe no formal advance

---

4. 31 U.S.C. § 3730(b)(2)-(4).

5. Judson W. Starr et al., *Environmental Crimes: Parallel Proceedings & Beyond*, C921 ALI-ABA 1051, 1055 (1994), *available in* WL, TP-ALL database ("A party is subjected to parallel proceedings when it is pursued in both a criminal case and a civil judicial or agency administrative action for the same infraction.").

6. A call from the District Attorney's or Attorney General's Office might be the first sign that the same action that is the focus of a grand jury investigation and *qui tam* action may also have created state civil and/or criminal liability. More likely, however, is the receipt of a complaint and/or grand jury subpoenas as the first notice of such action(s). *See* Anthony A. Joseph & R. Marcus Givhan, *The New Litigative Environment: Defending a Client in Parallel Civil and Criminal Proceedings*, ALA. LAW., Jan. 1999, at 50.

7. *See* Federal Acquisition Regulations, 48 C.F.R. § 9.407 (1998).

8. *See id.*

9. *See id.*

warning of suspension,[10] but any provider should consider a grand jury investigation as such.

B. Debarment & Licensing

Further action such as debarment is also possible. Debarment, known as "exclusion" in the health care provider context, means that a provider would be prohibited from contracting with the federal government for a set period of time.[11] Debarment is noticed by a hearing.[12] Surely, debarment would be the end of Community Hospital or most any other provider as a fiscally viable entity. In addition, hearings would likely be required before certification and licensing boards took action.[13] Community Hospital and its physicians could face decertification and license revocation, respectively.[14]

C. Private Civil Suits

In addition to these governmental actions, private civil suits can further complicate the picture. In publicly held corporations, shareholders may bring a derivative suit against directors on behalf of the corporation.[15] Shareholder derivative suits generally allege that the board of directors breached its fiduciary duty to the corporation.[16] In the context of the Community Hospital hypothetical, a complaint might allege that by entering into the arguably illegal CRA contract, the board of directors breached its fiduciary duty to Community Hospital.

Also, private insurers may cry foul. For example, those who have been billed by Community Hospital for CRA's radiology services may sue Community Hospital. Likewise, civil claims

---

10. *Id.*; David M. Zornow et al., *Managing the Fallout: The Criminal Investigator's Knock on the Door May Only Be the First of Many*, C640 ALI-ABA 127, 173-74 (1991), *available in* WL, TP-ALL database.

11. *See* 48 C.F.R. § 9.403(6) (1998).

12. Federal Acquisition Regulations, 48 C.F.R. § 9.406-3(c).

13. *See, e.g.*, Eisenberg v. Commonwealth, 516 A.2d 333, 337 (Pa. 1986).

14. *See* Young J. Lee, Inc. v. Commonwealth, 474 A.2d 266, 271 (Pa. 1983).

15. CHARLES R. O'KELLEY & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS CASES AND MATERIALS 318 (1996).

16. *Id.*

initiated by a provider's competitors based on antitrust theories could also be forthcoming.[17] Additionally, private-pay individuals could file claims under a variety of theories, ranging from fraud to breach of contract. These potential plaintiffs would be no less sensitive to unnecessary referrals and/or excessive charges.[18]

IV. Proceeding Concurrently or Consecutively

The government and private individuals or entities have the option of initiating additional actions while current ones are pending. If initiated, they also have the option of choosing whether to proceed with litigation of those actions concurrently. Though there are factors that weigh in favor of proceeding concurrently, the government has a greater interest in proceeding consecutively because of the advantages of collateral estoppel and because of its interest in avoiding the difficulties in separating civil and criminal discovery. In contrast, the interests of nongovernmental parties vary, depending on the facts of each situation. Regardless of the position that the government and private individuals take, the provider will face advantages and disadvantages under either approach.

A. The Government

As noted, the federal government has several options initially. In the context of the hypothetical, in addition to proceeding criminally, the government may join in and take over management of Jane Doe's civil *qui tam* action.[19] If the government were to take over management of the civil *qui tam* action, the issue of whether to proceed concurrently would arise.[20]

---

17. *Id.*

18. Zornow et al., *supra* note 10, at 186.

19. 31 U.S.C. § 3730(b)(2)-(4).

20. Regardless of whether the government pursues a provider criminally and civilly at the same time, it will likely proceed against all possible criminal defendants concurrently. *See, e.g.*, JOHN KAPLAN ET AL., CRIMINAL LAW: CASES AND MATERIALS 960 (3d ed. 1996).

1. Investigation.—In the investigative stage of health care fraud actions, the government is likely to proceed concurrently against an entity such as Community Hospital. This is true, in part, because the complex issues involved will often require the expertise of civilly and criminally trained agents.[21] The government carries out investigations through civil investigative demands ("CID"s), Inspector General subpoenas and traditional criminal investigative devices[22] such as search warrants. Once the grand jury has convened, and even more so when the *qui tam* action is unsealed, the government must proceed with litigation and/or prosecution much more carefully.

2. Litigation.—If the government plans to proceed with litigation both criminally and civilly, it may prefer to do so consecutively, rather than concurrently, prosecuting the criminal cases prior to civil actions.[23] Factors weighing in favor of this approach include: 1) the benefits of collateral estoppel and 2) maintaining separateness of civil discovery and grand jury matters.[24] On the other hand, the fact that civil violations may be ongoing is of great concern to public health and is an important factor which may weigh in favor of the Department of Justice ("DOJ") proceeding concurrently.[25]

a. Consecutive Litigation

Perhaps the most significant factor involved in proceeding with a criminal case first is collateral estoppel, also referred to as issue preclusion.[26] Generally, the doctrine of collateral estoppel forecloses relitigation of an issue actually litigated by a party in a prior proceeding.[27] Used "offensively," it could allow a par-

---

21. *See* Joseph & Givhan, *supra* note 6, at 48-49.

22. *See id.* at 50-51.

23. Starr et al., *supra* note 5, at 1058-59.

24. *Id.* at 1057 n.8, 1058-59.

25. *Id.* at 1059 (citing DEPARTMENT OF JUSTICE LAND AND NATURAL RESOURCES DIVISION GUIDELINES).

26. Another advantage for the government in proceeding consecutively is that it may avoid a lenient criminal sentence in light of large civil penalties that otherwise may be already levied. *Id.* at 1057 n.8, 1058-59.

27. *See* LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE 891-915 (1994).

ty to obtain judgment on an issue—whether Community Hospital violated the anti-kickback statute, for example—in a subsequent action by simply pointing to a prior judgment.[28] Given limited resources, any government entity would likely take advantage of the economy of collateral estoppel and proceed with the litigation of a parallel civil suit once criminal culpability was established.[29] For this reason, as well as others, it would be imperative that an entity in the position of Community Hospital prevail in the first action brought concerning this matter, or at least limit the scope of the first judgment in order to limit its preclusive effects.

The government may also choose to proceed consecutively because of the necessity of maintaining separation between civil discovery and grand jury proceedings. Rule 6(e)(2) of the Federal Rules of Criminal Procedure provides for the secrecy of grand jury proceedings.[30] Ideally, information from the grand jury cannot be used in furtherance of a civil investigation.[31] Once the government convenes a grand jury, it becomes subject to this limitation with respect to its investigation of an entity in the position of Community Hospital. A "Chinese wall" of sorts must be erected within any governmental department litigating and prosecuting both civil and criminal matters simultaneously.[32]

---

28. PAMELA H. BUCY, WHITE COLLAR CRIME: CASES AND MATERIALS 530 (1992) (citing Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 326-31 (1979)); Ashe v. Swenson, 397 U.S. 436, 443 (1970)). Specifically, the elements of collateral estoppel are: 1) the issue must be actually litigated; 2) the first action must result in a valid and final judgment; 3) the resolution of the issue must be essential to the judgment; and 4) the issue in the second proceeding must be identical to the issue in the first. *Id.* In addition, for a different party to use the prior judgment "offensively," a court would have to determine that Community Hospital had adequate incentive and a fair opportunity to defend itself in the prior action. *Parklane Hosiery*, 439 U.S. at 331-32 (giving discretion to the trial judge to apply "offensive" collateral estoppel if these conditions are met).

29. Of course, even if acquitted in a prior criminal proceeding under a beyond-a-reasonable-doubt standard, a health care provider would not be allowed to use collateral estoppel "defensively" in a subsequent civil action because of the lower applicable preponderance-of-the-evidence standard. *See* JOEL M. ANDROPHY, WHITE COLLAR CRIME 200 (1992).

30. FED. R. CRIM. P. 6(e)(2) (providing that "matters occurring before the grand jury" may not be revealed to others not working on the criminal investigation absent special circumstances).

31. *See* Starr et al., *supra* note 5, at 1061 (citing United States v. Gold, 470 F. Supp. 1336, 1353 (N.D. Ill. 1979)).

32. *See* Michael B. Himmel et al., *The Parallel Proceedings Pickle: Making the*

Counsel for the target of such investigations and prosecutions should watch carefully for any abuse of process and hold the government to this obligation.

Similarly, the difference between the scope of civil and criminal discovery may result in difficult-to-manage situations. Once a preliminary investigation has resulted in grand jury proceedings and/or an unsealed civil complaint, traditional discovery rules apply.[33] As criminal discovery is generally more limited than civil, especially for the defendant, there exists the possibility that a defendant might use broad civil discovery requests to obtain information about a simultaneous criminal investigation or prosecution that might otherwise be unavailable.[34] The possibility that a defendant might use such techniques to build a criminal defense is another reason the government may prefer to proceed with the criminal prosecution first.

b. Concurrent Litigation

The possibility of continued civil violations is the primary factor weighing in favor of the government proceeding concurrently.[35] That possibility, however, may be most efficiently addressed by suspension, rather than moving forward with more intensive proceedings that might require hearings or a trial. After all, if a provider cannot contract with the federal government, it cannot file false claims.

Thus, the federal government may prefer to first prosecute a health care provider criminally (assuming the grand jury indicts)

Best of Concurrent Civil and Criminal Financial Cases, 1995 WHITE COLLAR CRIME C-12, C-14 to -23.

33. Georgia A. Staton & Renee J. Scatena, *Parallel Proceedings—A Discovery Minefield*, ARIZ. ATT'Y, July 1998, at 17.

34. *See* Himmel, *supra* note 32, at C-14 to -17. *See, e.g.*, Campbell v. Eastland, 307 F.2d 478, 487 (5th Cir. 1963) ("A litigant should not be allowed to make use of the liberal discovery procedures applicable to a civil suit as a dodge to avoid the restrictions on criminal discovery and thereby obtain documents he would not otherwise be entitled to for use in his criminal suit.").

35. Other factors that may influence the government to proceed concurrently include: 1) whether the defendant's assets are in danger of dissipation, 2) whether there is a marginal relationship between civil and criminal violations, 3) whether there is an imminent statute of limitations, and 4) whether the government could obtain an advantage in overwhelming the provider's resources. Starr et al., *supra* note 5, at 1059.

and then to address substantive administrative and civil matters. However, when a *qui tam* action has already been filed, the government only has a limited amount of time to join, and it would therefore have to stop the civil proceeding.[36] The appropriate procedural mechanism for doing so will be a motion for a stay of the civil proceedings. A motion for a stay of civil proceedings, or of the discovery in a given case, is granted or denied at the discretion of the trial judge.[37] Ultimately, a court should weigh the potential harm caused by granting the stay against that caused by denial.[38] In practice, however, "[i]f the Government moves for a stay, the civil case generally grinds to a halt."[39]

B. Private Party Plaintiffs

The advantages of collateral estoppel from which the government benefits by first proceeding criminally will likely also prove attractive for private party plaintiffs who may be able to obtain summary judgment on issues in their suits against a provider by simply pointing to the judgment(s), criminal or civil, obtained by the government using similar facts and theories.[40] On the other hand, free from the other concerns the government must consider, they may instead commence their respective actions and proceed with discovery simultaneously with government prosecution and/or litigation, hoping that either the Speedy Trial Act,[41] a plea agreement, and/or settlement will establish certain elements of their cases before trial.[42] The pri-

---

36. 31 U.S.C. § 3730(b)(2)-(4) (providing that the government has 60 days after being notified of the lawsuit to enter an appearance).

37. ANDROPHY, *supra* note 29, at 197.

38. Starr et al., *supra* note 5, at 1065. Five factors are often cited as relevant to this evaluation: 1) plaintiff's interests in proceeding expeditiously, 2) interests of and burden on the defendant, 3) convenience of the court, 4) interests of those not party to the civil litigation, and 5) the public's interest. Staton & Scatena, *supra* note 33, at 32; Himmel, *supra* note 32, at C-18.

39. Himmel, *supra* note 32, at C-18.

40. *See supra* text accompanying note 28 for discussion and examples of "offensive" use of collateral estoppel.

41. *See* 18 U.S.C. §§ 3161-3174 (1994).

42. *See infra* notes 61-68 for a discussion on the collateral estoppel effects of such a scenario.

vate party plaintiffs' access to information will be governed by civil discovery rules.[43]

C. The Health Care Provider

Whether the government and private party plaintiffs proceed consecutively, as is likely, or concurrently, individual employees of the health care provider may risk waiving the Fifth Amendment privilege against self-incrimination, which could consequently harm the health care provider-employer. Thus, protecting that privilege is properly the concern of a prudent private employer. Additionally, if the government were to proceed concurrently, the health care provider may benefit from the liberal discovery allowed by the Federal Rules of Civil Procedure, as opposed to the more restrictive Rules of Criminal Procedure.

1. Protecting Privileges: The Fifth Amendment Privilege Against Self-Incrimination.—One of the most serious pitfalls relating to both concurrent and consecutive civil and criminal proceedings is the possibility of providing information—in the form of testimony or otherwise—in civil proceedings that could result in the waiver of otherwise applicable privileges in criminal proceedings. The relevant privileges are the attorney-client, work product, self-evaluation and Fifth Amendment self-incrimination privileges. Protecting and asserting the first three is properly the subject of a more detailed analysis that is beyond the scope of this Article. In short, however, they may be waived if even part of the information that would otherwise be covered by the privileges is inadvertently revealed.[44] The Fifth Amendment privilege against self-incrimination may similarly be waived and presents additional problems.

The Fifth Amendment provides that no person shall be compelled to be a witness against himself in any criminal proceeding.[45] By its terms, it is inapplicable to corporations.[46]

---

43. *See* FED. R. CIV. P. 1, 26.

44. *See generally* Michael J. McAllister et al., *Competing Interests in Parallel Proceedings*, 999 PLI/Corp. 669, 674-94 (1997), *available in* WL, TP-ALL database.

45. U.S. CONST. amend. V.

46. *See* Stanley A. Twardy, Jr. & Peter M. Holland, *Fighting on Two Fronts:*

However, through joint defense agreements with counsel representing a provider's personnel, the provider should be vigilant in ensuring its protection with respect to individual defendants. After all, it is likely that individual witness' self-incriminatory statements would also incriminate the provider.

The Fifth Amendment privilege must be guarded closely. If an individual were to provide inculpatory information in a civil deposition, for example, he or she might be deemed to have waived his or her privilege against self-incrimination for other purposes.[47] For example, if the vice president of Community Hospital decided to testify to the grand jury regarding the hospital's contractual arrangements, this testimony may waive any later assertion of his Fifth Amendment privilege, particularly at trial, with respect to matters about which he previously testified.

Of course, there is a trade-off for any individual who attempts to protect the privilege by refusing to provide information in a civil case.[48] Though it is impermissible for a fact-finder to draw any adverse inferences from a refusal to testify on self-incriminatory grounds in a criminal proceeding,[49] such inferences may be drawn in a civil case,[50] and the judge may instruct the jury accordingly.[51] Thus, a provider's interests could

---

Staying Civil Discovery During Criminal Proceedings, 24 LITIGATION 16 (1998), *available in* WL, TP-ALL database (citing United States v. Kordel, 397 U.S. 1, 7 (1970)); Himmel, *supra* note 32, at C-21.

47. *See* Gerald W. Heller, *Is "Pleading the Fifth" a Civil Matter? How the Constitution's Self-Incrimination Clause Presents Special Challenges for the Civil Litigator*, 42 FED. LAW. 27, 28 (1995), *available in* WL, TP-ALL database; Larry D. Thompson, *The Interrelationship of Civil & Criminal Environmental Proceedings*, 1997 A.B.A. SEC. CRIM. JUST., at F-63, *available in* WL, TP-ALL database. *But see* Himmel, *supra* note 32, at C-22 ("[T]he general rule is that testimony in one proceeding will not be deemed a waiver of Fifth Amendment rights in a separate case.").

48. The privilege may be invoked "in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory." Kastigar v. United States, 406 U.S. 441, 444 (1972). As Federal Rule of Evidence 501 provides that the privilege of a witness is ordinarily governed by state law, the Alabama Rules of Evidence are used here to illustrate a "trade-off" that arises in states nationwide. *See infra* notes 49-51; *cf.* Himmel, *supra* note 32, at C-22 (commenting on the national implications of the waiver issue associated with parallel actions).

49. *See, e.g.*, ALA. R. EVID. 512.

50. *See, e.g.*, ALA. R. EVID. 512A.

51. *See, e.g.*, ALA. R. EVID. 512(c).

easily conflict with those of an officer or director who might face substantial civil liability but limited criminal liability.[52] Provider personnel might also be placed in the same situation in an administrative or regulatory hearing. Such a dilemma presents a provider with one of its best opportunities for obtaining a stay of civil proceedings.[53]

A court may, in its discretion, grant a stay of civil proceedings whereby a defendant is placed in the unenviable position of having to choose whether to preserve his Fifth Amendment privilege and risk an adverse inference, or to testify and waive the privilege.[54] In addition to a stay, a court may enter any order required to prevent "annoyance, embarrassment, oppression, or undue burden or expense,"[55] such as protective or confidentiality orders.[56] The latter, however, may be modified by the court at any time and thus do not afford the same level of protection as a stay.[57]

2. Civil Discovery and Criminally Relevant Information.—Contemporaneous government civil litigation may provide at least one notable advantage to the provider. As discussed above, the scope of civil discovery is generally broader than criminal discovery, particularly for the defendant.[58] This raises the possibility that once the seal is lifted from a *qui tam* complaint, a targeted provider could gain access to criminally relevant information through civil discovery—information to which

---

52. It is not clear whether an adverse inference would be permitted against a provider as a civil defendant if an employee witness asserted her Fifth Amendment right. Alabama Rule of Evidence 512A, for example, provides for an adverse inference when a *party* refuses to testify on self-incrimination grounds. Whether that inference can be imputed to an employer is not clear. However, some federal circuit courts have held "that an employee's assertion of the privilege may create an adverse inference against his employer." Himmel, *supra* note 32, at C-21.

53. ANDROPHY, *supra* note 29, at 197.

54. *See* Heller, *supra* note 47, at 29. Another ground on which a stay might be granted is if administrative penalties and/or civil damages could so deplete a provider's resources as to deprive it of its Sixth Amendment right to counsel. *See* Staton & Scatena, *supra* note 33, at 19.

55. FED. R. CIV. P. 26(c). *See also* FED. R. CRIM. P. 16(d)(1).

56. Staton & Scatena, *supra* note 33, at 31; Heller, *supra* note 47, at 29.

57. Staton & Scatena, *supra* note 33, at 32-33.

58. *Id.* at 17.

it would otherwise not be entitled via criminal discovery.[59] As long as the discovery requests are made in good faith preparation to defend the civil case, they should be enforceable, through judicial order if necessary.[60]

Thus, in the event that the government does join the hypothetical *qui tam* action, Community Hospital should notice the deposition of key federal agents and file requests for admissions and interrogatories as soon as the seal is lifted. Of course, this is precisely the type of situation the government should be concerned with avoiding; and, even if caught unaware, a stay on the provider's motion would likely be forthcoming.

V. CONCLUDING/SETTLING PARALLEL PROCEEDINGS

Regardless of the form of the proceeding, concurrent or consecutive, the health care provider's ultimate goal should be obtaining a global settlement of all actions. Before reaching this global settlement, however, a health care provider must consider the preclusive effects of judgments, specifically, the implications of pleading guilty or nolo contendre.

A. Preclusive Effects of Judgments

Judgments based on a conviction after trial can bring the full effects of collateral estoppel,[61] and a health care provider could be collaterally estopped from contesting any findings essential to the conviction in later proceedings. Many administrative, regulatory and civil hearings and trials might then become mere formalities. Of course, these effects may ultimately pale in

---

59. *See* Starr et al., *supra* note 5, at 1065.

60. However, a provider would almost surely be prevented from obtaining civil discovery relevant to criminal proceedings through any civil action it instituted as plaintiff. *See* Campbell v. Eastland, 307 F.2d 478, 487 (5th Cir. 1962) (holding stay of civil discovery should have been granted when criminal defendant initiated civil suit as a tactical maneuver to obtain broader discovery); Staton & Scatena, *supra* note 33, at 18 ("The courts watch closely for such manipulation and look for instances of intentional circumvention of the criminal discovery rules." (citing *Campbell*, 307 F.2d at 487)).

61. *See* Zornow et al., *supra* note 10, at 167 (1994).

comparison to the FCA's harsh penalties and fines that could be the end of any health care provider.[62]

Consequently, given the risks of conviction, "it is not surprising that corporations frequently attempt to reduce their exposure and make the best out of a bad situation by pleading guilty and cooperating with the government."[63] The collateral effects of guilty pleas are unclear, but a majority of courts treat them the same as convictions following trial because pursuant to Federal Rule of Criminal Procedure 11(f), a court must have necessarily found that there was a "factual basis" for the guilty plea.[64]

On the other hand, a plea of nolo contendre, or "no contest," generally has no collateral estoppel effects at all,[65] nor is it admissible into evidence at a criminal or civil trial in federal court.[66] Prosecutors will be reluctant to accept such pleas, however, especially when they have evidence sufficient to go to trial—a risk few companies are willing to take.

Also, the FCA contains its own collateral estoppel provision.[67] Though its application is limited to subsequent suits

---

62. 31 U.S.C. 3729(a) (1994) (providing civil penalties of "not less than $5,000 and not more than $10,000" per false claim, "plus 3 times the amount of damages which the Government sustains").

63. David S. Krakoff et al., *The Hidden Cost to Corporate Settlements of Environmental Prosecutions—Is it Worth the Price?*, SD19 ALI-ABA 103, 108 (1998), *available in* WL, TP-ALL database.

64. *See* Zornow et al., *supra* note 10, at 168. Still, a small minority of courts hold that a guilty plea does not satisfy the "actually litigated" element of collateral estoppel. *Id.* at 168.

65. *See id.* at 167.

66. *See* FED. R. EVID. 410. Convictions based on such pleas may still, however, be used as the basis for administrative sanctions. *See, e.g.*, Eisenberg v. Commonwealth, 516 A.2d 333, 335-37 (Pa. 1986) (explaining that provider's nolo contendere plea to mail fraud charges relating to participation in Medicaid could be used against him in an administrative proceeding to terminate his right to participate in that program).

67. 31 U.S.C. 3731(d) (1994) provides:

> Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

brought under one of its sections, the FCA's estoppel provision gives full effect to criminal fraud or false claim judgments based on verdicts, pleas of guilty or even pleas of nolo contendre.[68]

B. Global Settlement

To avoid some of the possible collateral effects of a plea and to limit ultimate liability to the government, a provider should aggressively seek a "global settlement" of all parallel and related matters. Ideally, a global settlement includes all possible federal and state criminal, civil and administrative liability.[69] To obtain such a settlement, a provider must be diligent in obtaining the cooperation of all agencies whose enforcement authority could possibly be implemented for all charged and related conduct.[70] Depending on how quickly counsel acts, a global settlement can bypass several of the legal issues addressed above and likely result in the minimum overall sanctions at minimal cost. There are, however, important considerations in addition to straight-forward negotiation strategies.[71]

Some prosecutors have begun to require waiver of the attorney-client and work product privileges as a condition of accepting a global settlement agreement.[72] The purpose of such a provision is to obtain, among other things, the substance of any

---

Id.

68. *Id.*

69. *See* Robert S. Bennett & Alan Kriegel, *Negotiating Global Settlements of Procurement Fraud Cases*, 16 PUB. CONT. L.J. 30, 35-36 (1986).

70. *See id.*

71. The constitutional prohibition against successive criminal punishments for the same offense may be violated if civil penalties are so excessive as to constitute additional punishment for the same offense. *See* Hudson v. United States, 522 U.S. 93, 96 (1997). Prior to 1997, a provider clearly should have raised this Double Jeopardy argument as a fine- and damages-limiting strategy. *Hudson*, 522 U.S. at 96, 98-105. This is because prior to 1997, any civil fine levied in addition to criminal penalties, clearly out of proportion to the harm caused, would arguably have been impermissible under previous case law. *Id.* (citing United States v. Halper, 490 U.S. 435, 438 (1989)). *Hudson*, however, now requires a two-step inquiry into 1) congressional intent and 2) if the congressional intent was for a civil penalty, then whether, despite that intent, the penalty is "so punitive" as to make it criminal. *Id.* at 96. In this context, the higher standard makes the success of this argument dubious at best.

72. *See* Krakoff et al., *supra*, note 63, at 105.

corporate internal investigation.[73] This practice has been and should be denounced: "A policy that requires disclosure eviscerates the attorney-client privilege, the cornerstone of the Sixth Amendment right to counsel—which even applies to corporations."[74] Additionally, most courts have found that disclosure of an internal investigation waives the attorney-client privilege and the work product protection.[75] This waiver may permit "other government agencies . . . and plaintiffs in shareholder actions . . . to obtain through discovery or a Freedom of Information Act request investigative reports, strategy memos, employee interview summaries, or expert opinions, whose production was compelled as the price to obtain a more favorable plea agreement."[76] Thus, as in other contexts, a provider should adamantly resist waiving any applicable privileges.

VI. CONCLUSION

With an awareness of the issues addressed above, and with the end goal of limited liability at minimal cost always in mind, counsel for a defendant subjected to the possibility of parallel proceedings should be able to begin formulating a plan of action. Discovery can be coordinated to obtain and make use of civilly and criminally relevant information. Also, the government can be held to its obligation to conduct civil litigation appropriately by carefully limiting its use of criminal prosecution devices to their appropriate context. Counsel can protect all applicable privileges and ensure that they are not inadvertently waived. Furthermore, the possibility of waiver, and/or the adverse inferences that may be drawn from assertions of privilege, *inter alia*, can serve as grounds to stay litigation by other plaintiffs. Finally, attentive to the ultimate end of this posturing, counsel can aggressively seek the participation of all government entities to whom the defendant might ultimately have to answer in global settlement negotiations. By being conscious of the possible preclusive effects of judgments, counsel will be able to more careful-

---

73. *See id.*
74. *Id.* at 110.
75. *Id.* at 111 (footnote omitted).
76. *Id.*

ly evaluate the parameters of such a settlement and its ultimate value.

The current posture of the proceedings against Community Hospital suggests an initial strategy for managing and resolving all potential parallel actions. Given that a search warrant has been executed on the basis of information contained in a still-sealed civil *qui tam* action and that a grand jury has been convened, Community Hospital should first: 1) aggressively initiate good faith civil discovery as soon as the seal is lifted in order to obtain information that could be relevant to both potential civil and criminal liability and 2) move for stays of any related civil actions filed to which the government is not a party. Thereafter, in resolving liability issues, Community Hospital should actively seek participation of all possible government agencies in global settlement negotiations, wherein Community Hospital should: 1) seek to limit the scope of plea arrangements, thus limiting their preclusive effects, and 2) zealously protect all applicable privileges.

Jared Edward Mitchem