
CHAPTER 1

Introduction

The purpose of this book is to provide a central repository of statutes, case law, Department of Justice policy, federal agency policy, litigation strategy and ethical considerations involving the investigation, prosecution and resolution of parallel proceedings. The book will also address recent developments of the law in the field of international parallel proceedings.

The book examines in detail the investigative authority of numerous federal agencies including the Department of Justice, the Securities and Exchange Commission, the Commodities Futures Trading Commission, the Environmental Protection Agency, Health Care Financing Administration/HHS, the Office of the U.S. Trustee, and the Internal Revenue Service. The types of cases most frequently involved in parallel proceedings are reviewed in detail including False Claims Act and *Qui Tam* proceedings, securities cases, commodities cases, bankruptcy cases, environmental investigations, health care fraud and abuse, tax cases, financial institution fraud and claims of third party insurers.

Finally, the following chapters cover evidence collection tools that facilitate information sharing in various degrees in parallel proceedings, including search warrants, grand jury subpoenas, Inspector General subpoenas, Authorized Investigative Demands (AIDs), Civil Investigative Demands (CIDs), the federal discovery rules, administrative summonses and other such discovery mechanisms.

A. Definition

Parallel proceedings refers to the simultaneous or successive investigation or litigation of separate criminal, civil, or administrative proceedings commenced by different agencies, different branches of

government, or private litigants arising out of a common set of facts.¹ For example, criminal investigations and prosecutions seldom occur in a vacuum. Related or “parallel” proceedings, such as administrative or civil enforcement actions, private lawsuits, suspension and debarment proceedings, legislative investigations, consumer or competitor suits, wrongful termination actions, securities suits, and *qui tam* cases, may arise in tandem with the prosecution of a criminal case. However, a criminal action is not always part of every parallel proceeding. A civil enforcement action by the SEC, for example, may be accompanied by a shareholder derivative action.

In some instances, agency regulations will provide case specific definitions of a parallel proceeding. For example, the Commodities and Futures Trading Commission crafted a lengthy regulatory definition identifying the specific types of actions considered parallel proceedings.² Case specific definitions are addressed where appropriate in chapter 5.

B. Legislative Models and Policy

As early as 1912, the Supreme Court of the United States recognized the utilitarian features of parallel proceedings and approved their use when imbedded in legislation designed to facilitate effective legal enforcement. In the case, *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20, 27 (1912), the government filed an injunction action against sixteen corporate and thirty-four individual defendants to prevent the restraint of trade under the Sherman Antitrust Act in connection with the licensing of a certain patent. During the trial, several individuals were called to testify as witnesses by one of the corporate defendants. The government warned the individuals that their testimony might have the potential of exposing the witnesses to future criminal prosecutions. As a result, the witnesses asserted their respective Fifth Amendment privileges and refused to testify. The defendants raised the issue on appeal claiming the testimony should have been immunized.

1. U.S. Department of Justice, Office of Legal Education, Federal Grand Jury Practice, § 12.1 at 385 (August 2000).

2. 17 C.F.R. § 12.24.

The Court, in rejecting the argument, summarized the underlying legislative policy justification for parallel proceedings:

Whether the testimony, if given, would have conferred immunity, we are not called upon to determine. The only question is as to the extent of the court's discretion in such circumstances. The Sherman Act provides for a criminal proceeding to punish violations, and suits in equity to restrain such violations, and the suits may be brought simultaneously or successively. The order of their bringing must depend upon the government; the dependence of their trials cannot be fixed by a hard-and-fast rule, or made imperatively to turn upon the character of the suit. Circumstances may determine and are for the consideration of the court. An imperative rule that the civil suit must await the trial of the criminal action might result in injustice or take from the statute a great deal of its power. Besides a suit by the government, there may be an action for damages by a 'person injured by reason of anything forbidden by the act.' Must it also wait? Indeed, the reasons urged for the rule, if logically extended, would compel the postponement of the enforcement of the civil remedies until the exhaustion of criminal prosecutions or their expiration by lapse of time. Until either event occurs, the danger of incrimination cannot be said to have passed. It is manifest, therefore, that the most favorable view which can be taken of the rights of defendants in such situation is that they depend upon the discretion of the court in the particular case. We find no abuse of such discretion in the case at bar.

In the wake of the Supreme Court decision, Congress enacted several legislative models designed to facilitate the expanded use of parallel proceedings. For example, the Securities Act of 1933 and the Securities and Exchange Act of 1934 authorize simultaneous criminal and civil proceedings.³ The Commodities Exchange Act expressly defines and authorizes parallel proceedings under the CEA.⁴ The Foreign Corrupt Practices Act, passed in 1987, authorizes the Securities and Exchange Commission (SEC) to share civil enforcement powers with Department of Justice (DOJ) in addition to DOJ's power to initiate a parallel criminal proceeding. Indeed, issuers discovering evidence of a violation have a duty to self-report to the regulator and "other appropriate law

3. Securities Act of 1933, 48 Stat. 74 (1933), 15 U.S.C. §§ 77a–77mm; Securities Exchange Act of 1934, 48 Stat. 881(1934), 15 U.S.C. §§ 78a–78kk.

4. 17 C.F.R. § 12.24.

enforcement authorities.”⁵ Thus, parallel proceedings are not simply an unintended consequence of separate litigation actions arising out of the same matter. They are also a tool imbedded in legislative enforcement models.

In response to various legislative enactments, the courts have taken some steps to curb potential abuses arising out of the use of parallel proceedings, keeping in mind the goals of efficacy and judicial economy that parallel proceedings are designed to facilitate for both public and private litigants.⁶ In short, defendants subject to actual or threatened concurrent lawsuits do have some strategies available, albeit limited ones, to engage in damage control during the course of the investigation and subsequent legal action. Those strategies are explored in the following chapters. Unquestionably, however, the use of parallel proceedings is an effective litigation tool that can increase the risk of litigation for defendants.

C. Executive Branch and Federal Agency Cooperation

On July 9, 2002, President George W. Bush created, by executive order, the Corporate Fraud Task Force “to strengthen the efforts of the Department of Justice and Federal, State, and local agencies to investigate and prosecute significant financial crimes, recover the proceeds of such crimes, and ensure just and effective punishment of those who perpetrate financial crimes.”⁷ The idea behind the Task Force was to maximize its effectiveness through the use of parallel proceedings by combining the talents and experience of thousands of investigators, attorneys, accountants, and regulatory experts. The Task Force membership included the Assistant Attorneys General for the Justice Department’s Civil and Tax Divisions, the Director of the FBI, seven U.S. Attorneys

5. The SEC has stated that “[e]ffective compliance with the securities laws depends upon vigilant supervision, monitoring, and reporting of violations. When securities law violations are discovered, it is incumbent upon management to report them to the Commission and to other appropriate law enforcement authorities.” Press Release, Securities and Exchange Commission, Statement of the Securities and Exchange Commission Concerning Financial Penalties (Jan. 4, 2006), available at <http://www.sec.gov/news/press/2006-4.htm>.

6. See *United States v. Kordel*, 397 U.S. 1 (1970).

7. U.S. Department of Justice Archives, The President’s Corporate Fraud Task Force, <http://www.justice.gov/archive/dag/cftf/>.

Offices, the Secretaries of the Departments of Treasury and Labor, and the heads of the Securities and Exchange Commission, Commodity Futures Trading Commission, Federal Energy Regulatory Commission, Federal Communications Commission, United States Postal Inspection Service, the Department of Housing and Urban Development's Office of Federal Housing Enterprise Oversight, the Federal Housing Finance Agency, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Reserve, the Department of Housing and Urban Development, and the Special Inspector General for the Troubled Asset Relief Program (TARP).⁸

Between 2002 and 2008, the Department of Justice obtained nearly 1,300 corporate fraud convictions. These figures include convictions of more than 200 chief executive officers and corporate presidents, more than 120 corporate vice presidents, and more than 50 chief financial officers.⁹ The success of the program is attributed to the efficient deployment of prosecutors, federal agents, accountants, and support staff from dozens of federal agencies and offices within the Justice Department as part of the stepped up use of parallel investigations and prosecutions.

As part of this combined effort, Task Force members filed administrative enforcement suits, civil injunctive actions, and amicus briefs in civil corporate fraud cases; provided regulatory oversight for government-sponsored enterprises; established mandatory debarment procedures to prevent those with a history of fraudulent activity from participating in certain federal programs; implemented new anti-manipulation regulations; and issued show cause orders addressing market manipulation. Many of these activities involved the cooperation and coordination of multiple Task Force member agencies.¹⁰

In 2009, President Obama replaced the Task Force with the Inter-agency Financial Fraud Enforcement Task Force.¹¹ Described as "the

8. Press release, U.S. Department of Justice, President's Corporate Fraud Task Force Adds Six New Member Agencies (January 6, 2009), *available at* <http://www.justice.gov/opa/pr/2009/January/09-odag-003.html>.

9. U.S. Department of Justice Archives, The President's Corporate Fraud Task Force, <http://www.justice.gov/archive/dag/cftf/>

10. *Id.*

11. Press release, U.S. Securities and Exchange Commission, President Obama Establishes Interagency Financial Fraud Enforcement Task Force (November 17, 2009), *available at* <http://www.sec.gov/news/press/2009/2009-249.htm>

broadest coalition of law enforcement, investigatory and regulatory agencies ever assembled to combat fraud,"¹² the new task force has been substantially expanded to include state and local law enforcement agencies.¹³

In addition, the Attorney General has invited representatives of the National Association of Attorneys General, the National District Attorneys Association and other state, local, tribal and territorial representatives to participate in the task force through its Enforcement Committee. The expansion of participation in the Interagency Financial Fraud Enforcement Task Force demonstrates the increased resolve of the federal government to pursue parallel investigations and prosecutions at every level.

D. Separate Investigative Functions of Administrative Agencies and the Grand Jury

There are several bodies having diverse legal authority to investigate allegations of criminal or civil wrongdoing including the grand jury, administrative agencies, the Justice Department, and state or local prosecuting agencies. Typically, the power to investigate is accompanied by the power to issue process in the form of subpoenas or administrative summonses to collect documentary evidence and witness testimony. To better understand the issues attendant to the prosecution of parallel

12. Financial Fraud Enforcement Task Force, About the Task Force, <http://www.stopfraud.gov/about.html>

13. The task force is composed of senior-level officials from the following departments, agencies and offices: the Department of Justice; the Department of the Treasury; the Department of Commerce; the Department of Labor; the Department of Housing and Urban Development; the Department of Education; the Department of Homeland Security; the Securities and Exchange Commission; the Commodity Futures Trading Commission; the Federal Trade Commission; the Federal Deposit Insurance Corporation; the Board of Governors of the Federal Reserve System; the Federal Housing Finance Agency; the Office of the Comptroller of the Currency; the Small Business Administration; the Federal Bureau of Investigation; the Social Security Administration; the Internal Revenue Service, Criminal Investigations; the Financial Crimes Enforcement Network; the United States Postal Inspection Service; the United States Secret Service; the United States Immigration and Customs Enforcement; relevant Offices of Inspectors General and related Federal entities, including without limitation the Office of the Inspector General for the Department of Housing and Urban Development, the Recovery Accountability and Transparency Board and the Office of the Special Inspector General for the Troubled Asset Relief Program; and such other executive branch departments, agencies, or offices as the President may, from time to time, designate or that the Attorney General may invite.

proceedings, it is useful to understand the different functions of grand jury investigations and administrative agency investigations.

The grand jury occupies a unique role in our criminal justice system. It is an investigatory body charged with the responsibility of determining whether or not a crime has been committed. The grand jury “can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.” *United States v. Morton Salt Co.*, 338 U.S. 632, 642–43 (1950). The function of the grand jury is to inquire into all information that might possibly bear on its investigation until it has identified an offense or has satisfied itself that none has occurred. As a necessary consequence of its investigatory function, the grand jury paints with a broad brush.

A grand jury subpoena is thus much different from a trial subpoena, where a specific offense has been identified and a particular defendant charged. “[T]he identity of the offender, and the precise nature of the offense, if there be one, normally are developed at the conclusion of the grand jury’s labors, not at the beginning. *Blair v. United States*, 250 U.S. 273 (1919). If a motion to quash a grand jury subpoena is denied, it is in most cases a non-appealable order, and refusal to comply will subject the party to a rule to show cause followed by a contempt citation.¹⁴ An appeal may be allowed following a finding of contempt. Chapter 3 discusses obtaining evidence through the use of grand jury subpoenas and Rule 6(e) of the Federal Rules of Criminal Procedure, the confidentiality rule, which limits information disclosure and thus, limits information sharing in the context of parallel proceedings. However, the mere fact of the pendency of a grand jury investigation does not result in an automatic stay or termination of a parallel civil investigation or parallel civil litigation instituted by third parties.

An administrative agency is limited to investigating matters that it can statutorily regulate. For that reason, chapter 5 provides an in-depth description of relevant federal agency statutory and regulatory authority that governs the jurisdiction of agency enforcement. Administrative subpoenas are generally not self-enforcing and require agency recourse to the courts for enforcement. The agency must show that the information is relevant and sought for a legitimate purpose. For example, case

14. See, *United States v. Calandra*, 414 U.S. 338 (1974).

law prohibits the issuance of a summons in a civil investigation “solely for the purpose of” obtaining evidence for use in a criminal case. An order of enforcement is appealable.¹⁵

Some federal agencies have the authority to conduct both criminal and civil investigations. However, upon discovering alleged criminal conduct, the agency must refer the case to the Department of Justice for criminal prosecution. Again, that referral does not necessarily result in the automatic stay or termination of the civil investigation. Both may continue to proceed along parallel courses.

Accordingly, chapters 4 and 5 examine various Department of Justice policies governing the use of parallel proceedings and information sharing. The Department of Justice may be involved in parallel proceedings within its own internal criminal and civil divisions, or with another federal or state regulatory agency or involving third party civil litigants “riding on DOJ’s coat tails” to collect evidence for private plaintiffs.

15. *United States v. Powell*, 379 U.S. 48 (1964).