

COMMERCIAL LITIGATION

Maximizing Criminal Court Results in the Civil Arena Through Collateral Estoppel

By Leo K. Barnes Jr.



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For civil counsel engaged to right criminal wrongs committed by a corporation's former officer or employee, the frustration of the delays incident to a parallel criminal proceeding can nonetheless ultimately bear fruit in the civil arena. While the civil proceedings stand in the proverbial second place behind a criminal case (as civil discovery may be obstructed by stay applications and Fifth Amendment invocations) there is opportunity nonetheless. Inasmuch as criminal proceedings are generally completed on a faster track than the civil counterparts, when that criminal matter results in a guilty plea or verdict, it is capable of easy transformation to corresponding civil liability.

Preclusion, Generally

The doctrine of issue preclusion bars re-litigation in a second proceeding, even one involving a different cause of action, of issues that have been actually and necessarily determined in a prior adjudication. To invoke issue preclusion two requirements must be met: "first the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from re-litigating the issue must have had a full and fair opportunity to contest the prior determination."

In *Pav-Co Asphalt, Inc. v. County of Suffolk*, the Second Department observed:

Where a criminal conviction is based on facts identical to those in a related civil action, the plaintiff in the civil action can successfully invoke the doctrine of collat-

eral estoppel to bar the convicted defendant from relitigating the issue of liability []. "The doctrine applies whether the conviction results from a plea or a trial" [] "The party seeking the benefit of collateral estoppel bears the burden of proving that the identical issue was necessarily decided in the prior proceeding, and is decisive of the present action" [internal citations omitted].

In *William Floyd Union Free School Dist. v. Wright*, James Wright was the former treasurer of the plaintiff William Floyd Union Free School District. In January 2006, Wright pleaded guilty to one count of grand larceny in the second degree and seven counts of offering a false instrument in the fifth degree. His plea included his acknowledgment that he stole money while employed by plaintiff.

The plaintiff filed a complaint to recover the stolen funds and all compensation it paid the defendant following his breach of fiduciary duty. The Supreme Court determined that the defendant was collaterally estopped from litigating liability with respect to the plaintiff's breach of fiduciary duty cause of action, and granted summary judgment to the plaintiff. The Second Department affirmed:

In connection with his plea of guilty, Cifonelli testified under oath that he remained in the plaintiff's employ until 2004 following his sham retirement in August 1998. "Collateral estoppel effect will be given to issues necessarily decided in prior criminal actions, including those which terminate in judgments based on pleas of guilty" (*Colby v. Crocitto*, 207 A.D.2d 764, 765, 616 N.Y.S.2d 399). The issue of

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Cifonelli's employment status was material to and decided in the prior criminal action, and is critical to the instant action. Moreover, there is no evidence that Cifonelli was denied a full and fair opportunity to contest this point. Accordingly, Cifonelli is collaterally estopped from disputing his employment status between 1998 and 2004 (see S.T. Grand, Inc. v. City of New York, 32 N.Y.2d 300, 304, 344 N.Y.S.2d 938, 298 N.E.2d 105; Colby v. Crocitto, 207 A.D.2d at 765, 616 N.Y.S.2d 399).

The Second Department ruled that a grand larceny plea bears collateral estoppel effect incident to a corresponding breach of fiduciary duty civil claim. The opinion continued:

Moreover, the Supreme Court properly determined that the defendants' pleas of guilty to grand larceny in the second degree and other crimes established the plaintiff's entitlement to judgment as a matter of law on its breach of fiduciary duty cause of action (see American Map Corp. v. Stone, 264 A.D.2d 492, 492-493, 694 N.Y.S.2d 704; Lusklin v. Seoane, 226 A.D.2d 1144, 641 N.Y.S.2d 478).

These same issues came to light in the criminal and civil proceedings surrounding Tyco International's former Chief Executive Officer Dennis Kozlowski in the Southern District matter entitled Tyco International Ltd v. Dennis Kozlowski. According to the decision by Judge Griesa, Kozlowski rose through the ranks after being hired in 1975 as the Director of Internal Audit, ascending to Chief Executive Officer and Chairman of the Board as of 1997. In June 2002, Kozlowski was discharged from Tyco because pending an imminent indictment for sales tax evasion; the ensuing investigation revealed that Kozlowski had conspired with other corporate officers to pilfer Tyco's treasury of tens of millions of dollars. Kozlowski was

charged with 23 criminal counts, including 12 counts of grand larceny, one count of conspiracy to commit larceny, nine counts of falsifying business records, and one count under New York's Martin Act. Kozlowski was convicted on 22 of the 23 counts of the indictment during the 2005 trial and was sentenced to prison; the convictions were affirmed on appeal.

When he was discharged from Tyco in 2002, Kozlowski demanded payment pursuant to certain deferred compensation agreements. Tyco refused and instead filed an action asserting claims against Kozlowski. Kozlowski answered with counterclaims, seeking payment under the deferred compensation agreements and indemnification for other civil suits naming him as a defendant. Tyco responded that the compensation agreements were void because they were fraudulently induced and also represented compensation that Kozlowski must forfeit under New York's "faithless service doctrine." Judge Griesa invoked collateral estoppel to found summary judgment in favor of Tyco:

Earlier in this decision, the court summarized the grand larceny and falsification of business records counts on which Kozlowski was convicted in his criminal case. The convictions necessarily constituted jury findings not only that Kozlowski wrongfully took or misappropriated the funds and property of Tyco, and falsified Tyco's business records, but that he did so with the intent to do the wrong, and, in connection with the false entry, that he did so with intent to deceive. These convictions establish the elements of the following causes of action in the civil case beyond any doubt.

The theft of millions of dollars from Tyco was, to say the least, a breach of fiduciary duty (first cause of action). The same can be

said of the elements of the second and third causes of action, alleging, respectively, inducing breach of fiduciary duty and conspiring to breach fiduciary duty. There is no question that any civil litigation on the issue of liability on the fiduciary duty causes of action would involve identical issues as those litigated in Kozlowski's criminal case.

Thereafter, Judge Griesa likewise rejected Kozlowski's counterclaims for deferred compensation because the same was proffered during periods of disloyalty:

Even if these contracts were validly entered into, Kozlowski cannot recover on them. The "faithless servant doctrine," used as a sword in Tyco's claims, may also be used as a shield to Kozlowski's counterclaims. As a result of Kozlowski's many breaches of fiduciary duty, Tyco has no duty to honor compensation agreements made during Kozlowski's period of disloyalty.

In the present case, Kozlowski's multiple breaches of his fiduciary duty over several years clearly demonstrate his faithless ser-

vice. Kozlowski must therefore forfeit all compensation and benefits, deferred or otherwise, earned during his period of disloyalty, which began at its latest in September 1995. Because all of the benefits at issue in these contracts were earned during Kozlowski's period of disloyalty, Tyco is relieved from any obligation to honor them.

Although the burden of establishing liability may be resolved by virtue of the criminal plea or verdict, civil counsel nonetheless bears the burden of establishing damages at an inquest. To the extent that there may be some down time during the civil action while a stay or Fifth Amendment invocation obstructs discovery proceedings, civil counsel is wise to actively monitor the developments in criminal court, document plaintiff's damages, and be ready to pounce upon opportunities provided by the parallel criminal litigation.

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