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# The Collateral Effects of Deferred Prosecution Agreements to Corporations in Subsequent Civil and Regulatory Actions

Over the past decade, the deferred prosecution agreement (DPA) has become a standard tool of the U.S. Department of Justice. A DPA essentially is a contract between the DOJ and the target of an investigation — often a corporation or business entity — that resolves a federal criminal investigation short of a formal prosecution or guilty plea. Its availability provides the DOJ with a middle ground between closing an investigation without further prosecutorial pursuit and indicting a corporation, which can have adverse collateral consequences to the corporation's employees, investors, pensioners, suppliers and customers. For its part, the corporation avoids full prosecution. To do so, it typically must acknowledge wrongdoing, admit to a "statement of facts" that supports the government's theory of liability, refrain from breaking laws under the threat of resuming the deferred prosecution, pay an often sizeable monetary penalty and permit a government-appointed monitor inside the corporation for a few years. The DOJ often publicly files a formal charging document setting forth the necessary elements of the alleged crime.

The effects of the DPA go beyond a 10-figure monetary payment, the potential media coverage, and life with an inside monitor. The DPA can have a formidable and striking second life in ongoing or subsequent civil and regulatory proceedings, which require corporate counsel to navigate sensitive, uncharted waters. Notable issues include:

**Noncontradiction Clauses**. Many corporations facing DOJ criminal investigation are also entangled in parallel private civil actions, regulatory proceedings or state attorneys general investigations. While the standard terms of the DPA permit the corporation to assert a defense in such other proceedings, they typically expressly prohibit the company from contesting or contradicting the DPA's representations or statement of facts. If the DOJ subjectively determines that the corporation has done so, it can demand an immediate and loud retraction by the corporation or unilaterally declare a breach of the DPA. The noncontradiction restrictions can effectively eliminate case strategies while emboldening opponents to explore the DPA's factual underpinnings to obtain settlement leverage. The restriction also presents the practical dilemma of handling witness testimony that is inconsistent with the DPA and its statement of facts. While the standard DPA provides some safe-harbor language permitting witnesses to testify truthfully, the practical application creates testimonial landmines in future civil litigation. This is particularly the case as to witnesses testifying as corporate representatives under Federal Rule of Civil Procedure 30(b)(6), where the testimony is provided by the corporation speaking through a designated deponent. In that scenario, because the deposition testimony binds the company, sensitivity to the factual representations in the DPA is crucial.

**Civil Discovery**. Once the DPA becomes publicly known, plaintiffs will and do seek information regarding the DPA through civil discovery. Specific precedent remains largely undeveloped regarding DPAs, but courts often have rejected similar attempts to obtain deposition testimony of corporate executives regarding plea agreements, consent decrees and settlement agreements, including the negotiations and events leading to them. For example, the Eastern District of New York has limited the avail-

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ability of deposition testimony about the resolution of past criminal investigations by way of a plea agreement. *See West Virginia ex rel. McGraw v. Eli Lilly & Co.* (In re Zyprexa Prods. Liab. Litig.), Nos. 04-MD-1596(JBW), 06-CV-5826(JBW), 2009 U.S. Dist. LEXIS 77665, *80 (E.D.N.Y. Feb. 18, 2009). Of course, nonprivileged written evidence relating to the DPA may be more difficult to protect than testimony. In short, corporations must be mindful of the discoverability of its DPA and accompanying discussions with the DOJ.

**Admissibility of the DPA**. Only a handful of cases have addressed the admissibility of a DPA in a civil case, and they do not establish a firm precedent. For instance, the Eastern District of Louisiana, presiding over BP's Deepwater Horizon multidistrict litigation, granted a motion *in limine* to prevent the jury from receiving evidence about a DPA that resolved allegations about an earlier oil refinery accident in Texas. However, the court deemed the DPA potentially relevant to future trial proceedings, including whether punitive damages would be awarded. *See In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, No. MDL 2179, 2012 WL 413860, at *3 (E.D. La. Feb. 9, 2012).

Trial counsel will undoubtedly will continue to battle over relevance, probative value, cumulative evidence, prejudicial effect and jury confusion until higher courts establish clear precedent. Additional evidentiary issues that courts likely will confront include the admissibility of the DPA as evidence of other crimes, wrongs or acts (Federal Rule of Evidence 404(b)); the inadmissibility of the DPA and the DPA discussions as settlement negotiations (FRE 408(a)); the admissibility of the DPA as a plea agreement versus its inadmissibility as a plea negotiation (FRE 410); and the use of the DPA as impeachment evidence of a criminal conviction (FRE 609(a)(2)). Moreover, even if the court rules the DPA evidence inadmissible as an initial matter, trial counsel will need to shepherd the case in a manner that does not open the door to its introduction. This may require trial counsel to avoid making affirmative representations about the character of the corporation.

**Punitive Damages**. Where a court deems a DPA inadmissible in the early stages of a trial, it may find it more relevant and appropriate — and thus, admissible — in the context of a jury's assessment of punitive damages or civil fines. Indeed, as suggested by the *Deepwater Horizon* case, the DPA could potentially be admitted in a punitive damages phase, including in a case arguably unrelated to the specific conduct that is the subject of the DPA.

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While DPAs are now commonplace in DOJ prosecutions and investigations, their effect on civil litigation largely remains a blank canvas. Many of the discovery and admissibility challenges in the coming years will be tested in courts and will help to shape the value and risks of DPAs going forward. In the meantime, corporations in the crosshairs of a DOJ investigation should consider the mid- to long-term litigious issues associated with entering into a DPA.