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WHEN THE WITNESS CLAMS UP: PRACTICAL TIPS FOR DEALING WITH THE INVOCATION OF FIFTH AMENDMENT RIGHT AGAINST SELF-INCRIMINATION.

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When the Witness Clams Up: Practical Tips for Dealing with the Invocation of Fifth Amendment Right Against Self-Incrimination.

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I. Introduction:

The Fifth Amendment privilege against self-incrimination is one of our most fundamental rights as citizens. While we normally think of a witness' assertion of his Fifth Amendment right against self-incrimination in the criminal context, the invocation of a witness' Fifth Amendment right against self-incrimination also often has important implications to civil matters. The Fifth Amendment declares in part that "No person . . . shall be compelled in any criminal case to be a witness against himself." However, courts have recognized that the right against self-incrimination is to be applied to civil matters. In the fidelity context, sureties often are faced with the scenario of having key witnesses invoke their Fifth Amendment privilege. These include the dishonest employee, who desires to avoid exposing himself to criminal liability, alleged co-conspirators for whom no coverage exists, and even mere witnesses who believes it is safer to remain silent. Fidelity cases also often present difficult questions concerning the application of the adverse inference to be drawn as a result of an invocation of the Fifth Amendment. This paper addresses the fundamentals of the invocation of the Fifth Amendment and some practical tips for handling the assertion of this privilege. Knowing where, who and how the Fifth Amendment can be invoked will hopefully provide insight on dealing with Fifth Amendment dilemmas and how to pry loose key evidence sought by the surety.

II. Where and When the Fifth Amendment Can Be Invoked

Because the Fifth Amendment is such an important right, courts have recognized that the privilege against self-incrimination can be invoked in any proceeding where the witness "reasonably believes that his testimony could be used in a criminal prosecution or could lead to other evidence that might be so used."[1] The testimony must tend to incriminate the witness, not merely subject the witness to disgrace or disrepute. The Fifth Amendment privilege has broad application; it may be raised in any proceeding, including civil, criminal, administrative, judicial, investigatory, and adjudicatory proceedings.[2] The constitutional privilege protects a witness against incrimination under federal as well as state law.[3]

In keeping with its desire to safeguard Fifth Amendment rights, the Supreme Court has explicitly held that a court cannot compel a witness to answer questions over a valid assertion of his Fifth Amendment rights.[4]

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[1] *Hoffman v. United States,* 341 U.S. 479, 486 (1951)*; Kastigar v. United States*, 406 U.S. 441, 444-45 (1972).

[2] *Kastigar, Id.*

[3] *Coushatta Tribe of Louisiana v. Abramoff,* 2009 U.S. Dist LEXIS 71540, *12 (2009), *citing Murphy v. Waterfront Comm'n*, 378 U.S. 52, 78 (1964) and *Malloy v. Hogan*, 378 U.S. 1 (1964)(the feared prosecution may be by either federal or state authorities).

[4] *Pillsbury Co. v. Conboy,* 459 U.S. 248, 256-7 (1983).

Additionally, the Supreme Court has written that the privilege against self-incrimination as embodied in the Fifth Amendment "must be accorded liberal construction."[5] The Supreme Court has expressed:

> The privilege afforded not only extends to answers which in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime.[6]

To properly invoke the Fifth Amendment, the witness does not need to show that his testimony would be certain to subject to prosecution. Rather, it is enough that there is a reasonable possibility of prosecution, and if the testimony, although falling short of proving the crime, will tend to a conviction when combined with evidence from other sources.[7] Thus, the mere possibility of criminal prosecution is all that is needed to properly invoke the Fifth Amendment.[8] A witness can invoke the privilege even while maintaining his innocence.[9]

The right not to answer potentially incriminating questions, however, is not absolute. The prohibition of compelling the testimony of a witness in any setting is predicated upon there being a danger that the testimony might be used against the witness in a later criminal proceeding. The protection afforded by the Fifth Amendment is confined to instances where the witness has a *reasonable* cause to apprehend danger from a direct answer.[10] Where there is only "but a fanciful possibility of prosecution," the allowance of the Fifth Amendment privilege is improper.[11] Thus, if by reason of the statute of limitations there remains no possibility that a prosecution of the witness could result from or be assisted by his answers to questions, he is not justified in refusing to answer.[12]

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[5] *Hoffman v. United States*, 341 U.S. at 486.

[6] *Malloy v. Hogan*, 378 U.S. at 11, *citing Hoffman*, 341 U.S. at 486-487 (to sustain the privilege, it need only be evidenced from the implications of the question, in the setting in which it is asked, that a responsive answer or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result).

[7] *In Re Kave*, 760 F.2d 343, 354 (1st Cir. 1985).

[8] *In re Seper,* 705 F.2d 1499,1501 (9th Cir. 1983).

[9] *Gruenwald v. United States*, 353 U.S. 391, 421-22 (1957).

[10] *Hoffman*, 341 U.S. at 486-47.

[11] *National Acceptance Co. of America v. Bathalter*, 705 F.2d 924, 927 (7th Cir. 1983).

[12] *U.S. v. Goodman*, 289 F.2d 256, 259 (4th Cir. 1961);

III. Who May Assert the Right Against Self-Incrimination

Not only is understanding where and when the Fifth Amendment can be invoked, but also knowing who has the right to clam up is important. It is well established that the privilege against self-incrimination is a "purely personal privilege" which shields an individual from compelled testimony and compelled production of his personal papers.[13] As such, a witness who is being deposed as a representative of a company, a witness who seeks to protect another from incrimination, and even a corporate representative who seeks to avoid production of documents that may incriminate himself personally would be mistaken in trying to invoke the Fifth Amendment's protection.

The Fifth Amendment's protections is a personal right that solely belong to natural persons.[14] We are all familiar with the concept of the Fifth Amendment in the criminal context where an individual cannot be compelled to be a witness against himself. In the civil context, this right against self-incrimination applies as well. However, the right against self-incrimination is limited to an individual person to invoke for himself. In other words, a person may not seek the Fifth Amendment's protections in an effort to protect another individual or entity.[15] Similarly, one cannot use another's right against self-incrimination for his own protection.

As "an intimate and personal" right, the right against self-incrimination cannot be used to prevent others from obtaining incriminating evidence about you through use of a subpoena to other persons, such as one's accountant or bank.[16] The Supreme Court has recognized that the Fifth Amendment prohibits compelling "an accused to bear witness against himself" but does not prohibit incriminating testimony being elicited from others.[17] Where disclosure of incriminating evidence is sought from a witness' bank or accountant, such witness cannot rely on the Fifth Amendment to quash the subpoena as that witness is not being forced to do anything to incriminate himself. Thus, where incriminating evidence is held by others, invocation of one's Fifth Amendment rights will be of no help to prevent the disclosure of such incriminating evidence.

The Fifth Amendment also cannot be used to protect any artificial persons, such as corporations, unions, political organizations, partnerships or other types of "collective

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[13] *Boyd v. United States*, 116 U.S. 616 (1886); *Hale v. Henkel*, 201 U.S. 43, 69 (1906).

[14] The privilege has been extended to resident foreigners of the United States, but cannot be invoked by non-resident foreigners. *Bear Stearns & Co. v. Wyler*, 182 F.Supp. 2d 679,680 (N.D.Ill. 2002).

[15] *Rogers v. United States*, 340 U.S. 367 (1951); *United States v. White*, 322 U.S. 694, 699 (1944).

[16] *In re Grand Jury Proceeding*, 40 F.3d 959, 962 (9th Cir. 1994); *United States v. Schlansky*, 709 F.2d 1079, 1084 (6th Cir. 1983)(Fifth Amendment cannot be used to prevent disclosure in response to subpoena to accountant).

[17] *Couch v. United States*, 409 U.S. 322, 328 (1973), *citing Johnson v. United States*, 228 U.S. 457, 458 (1913).

entities."[18] Similarly, representatives of such collective entities cannot refuse to produce records belonging to the entity in response to a subpoena, even where the production of records might incriminate the collective entity[19] or that representative personally.[20] The exception to the rule regarding "artificial entities" is the sole proprietor. The right of the Fifth Amendment can be invoked by a sole proprietor as there is no institutional identity independent of the sole proprietor. [21]

IV. What Evidence Is Subject to the Fifth Amendment Privilege

Most people think of witnesses taking the Fifth Amendment in connection with oral testimony. The Fifth Amendment may be invoked in response to questioning at a hearing, at a deposition, or trial. In the wake of the Enron, Worldcom, and Healthsouth scandals, several witnesses in congressional hearings "pled the Fifth." Question after question, witnesses "respectfully declined" to answer question posed to them, advising that "upon advice of counsel, I respectfully decline to answer the question by asserting my rights and privileges under the Fifth Amendment of the U.S. Constitution."

While the Fifth Amendment is often invoked in connection with a witnesses' testimony, the Fifth Amendment may, in limited instances, also be invoked in connection with requests for the production of documents. Witnesses have also invoked the Fifth Amendment when faced with a subpoena ordering the production of documents. In *Fisher v. United States*, the Supreme Court held that the Fifth Amendment privilege against self-incrimination could be invoked to protect an individual from being compelled to personally produce documents, even if the contents of those documents were not privileged, if the act of production would have testimonial aspects that would be self-incriminating.[22] The Court noted that by producing documents, the producing party implicitly concedes possession and control of the documents and indicates that the documents produced are, in fact, the documents described in the subpoena, thus implicating the testimonial prerequisite for Fifth Amendment protection. This privilege is now known as the "act of production privilege." To receive Fifth Amendment protection under the "act of production privilege" two requirements must be met: (1) the act of producing the documents must have "testimonial" aspects; and (2) the documents must be self-incriminating. To satisfy the self-incriminating prong of the privilege, the party asserting the privilege must demonstrate a "real and substantial risk" that answers may tend to

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[18] *Braswell v. United States,* 487 U.S. 99, 105 (1988)*; Hale v. Henkel,* 201 U.S. at 69; *United States v. White*, 322 U.S. 694, 701 (1944); *Rogers v. United States*, 340 U.S. 367, 371-372 (1951), *Bellis v. United States*, 417 U.S. 85 (1974).

[19] *Roe v. United States*, 847 F.2d 1024, 1029 (2 Cir. 1988); *SEC v. Kingsley*, 510 F.Supp. 561, 563 (D.D.C. 1981).

[20] *In re Grand Jury Witnesses*, 92 F.3d 710, 712-13 (8th Cir. 1996); *Braswell*, 487 U.S. at 99.

[21] *SEC v. Kingsley*, 510 F.Supp. at 563.

[22] *Fisher v. United States*, 425 U.S. 391, 410 (1976).

incriminate. [23] The act of production may result in incriminating testimony in two situations: (1) if the existence and locating of the subpoenaed papers are unknown to the government; or (2) where production would implicitly authenticate the documents.[24] Thus, if the existence and location of the subpoenaed papers are a foregone conclusion and the subpoenaed party adds little or nothing to the sum total of the government's information by conceding that he is in fact has the papers, then no constitutional rights are touched by the enforcement of the subpoenas.

Even where a party may be able to invoke the act of production privilege, an exception exists for "required records." Under this exception, a person whose records are required to be maintained by law has no Fifth Amendment protection against self- incrimination when those records are ordered to be produced. To qualify as a required record, a document must satisfy a three-part test: (1) it must be legally required for a regulatory purpose; (2) it must be of a kind that the regulated party customarily keeps, and (3) it must have assumed 'public aspects" which render it analogous to public documents.[25] This exception presupposes that compliance with the government's inquiry may be incriminating. Accordingly, where the narrow parameters of the doctrine are met, and the balance weighs in favor of disclosure, the information must be forthcoming even in the face of potential incrimination. The required record exception has been applied to require the production of documents such as tax returns, W-2s, 1099s statements, and employee earning statements.[26]

In the fidelity context, the surety should argue that the bond or commercial crime policy's cooperation clause requires the insured to produce all relevant documents to the insurer during its investigation of the claim, including privileged and protected documents to the extent those documents have any bearing on coverage.[27] Where the Fifth Amendment is invoked by an insured's employee, however, the surety will likely not be able to rely on a

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[23] *In re Sambrano Corporation*, 2010 Bankr. LEXIS 4695, *5 (B.R. Tx. 2010), *citing In Re Gilboe*, 699 F.2d 71, 74-75 (2d Cir. 1983).

[24] *AAOT Foreign Econ. Ass'n Technotroyexport v. International Dev. & Trad Servs*., 1999 U.S. Dist. LEXIS 16617, *19-20 (S.D.N.Y. 10/21/99); *Fisher, supra* ((refusing to extend Fifth Amendment protection of certain tax documents as production would not be testimonial as government already knew the existence of the requested documents and could independently authenticate them).

[25] *AAOT*, at 20-21; *In re Sambrano Corporation*, 2010 Bankr. LEXIS 4695, *9.

[26] *In re Sambrano Corporation*, *11 (ordering production of witness' tax forms, including tax returns, w-2s, 1099s, and K-1s); *U.S. v. Clark*, 574 F.Supp. 2d 262, 267 (D.Conn. 2008).

[27] Michael Keeley and Tracey Archbold, *The Attorney-Client Privilege and the Work Product Doctrines - the Boundaries of Protected Communications Held by Insureds and Insurers*, XIV, Fidelity Law Journal, 1, 50 (2008); *Fidelity Bank Cop. v. United Union Fire Ins. Co. of Pittsburgh, Pa.* 1992 WL 5572 (E.D.Pa. 1992); *But see Kimberly-Clark Corp. v. Continental Cas. Co.*, 2006 U.S. Dist. LEXIS 63576 (N.D.Tx 2006)(holding that cooperation clause in commercial crime policy did not operate as a waiver of all privilege claims, including attorney-client and/or work product privileges).

breach of the policy's cooperation clause to bar coverage.[28] Because the Fifth Amendment may serve as a roadblock to obtaining key evidence, counsel should always seek out alternative methods to obtain relevant information and documents, such as contacting witnesses' counsel or even by attempting to obtain evidence from criminal investigators or prosecutors.

V. Application in Civil Litigation

The invocation of the Fifth Amendment can arise at several points during the course of civil litigation and may often pose an obstacle to obtaining necessary evidence in fidelity cases. While one often sees invocation of the Fifth Amendment during trial or in depositions, such as where the dishonest employee gives oral testimony, the Fifth Amendment privilege may be raised in response to written discovery or even at the pleading stage. Even if the Fifth Amendment is invoked, there may be instances where the witness inadvertently waives the protections afforded by the Fifth Amendment, providing the opportunity to pry loose important evidence from such witness. Further, counsel should be aware and plan for the possible evidentiary consequences that may arise as a result of a witness' invocation of the Fifth Amendment, such as an imposition of an adverse inference or preclusion of testimony altogether. As the invocation of Fifth Amendment may arise at any point during the course of litigation, counsel should always have a plan of action ready to effectively deal with this circumstance.

A. Pleadings and Written Discovery

The invocation of the Fifth Amendment may arise as early as the pleading stage in litigation. If properly invoked by a defendant, a court will likely treat a party's invocation of his Fifth Amendment right as a specific denial.[29] At the pleading stage, the party asserting the Fifth Amendment must assert the right with particularity. One cannot rely on a blanket assertion as an excuse to refuse to respond to allegations of a complaint.[30] To do so may result in a finding that the Fifth Amendment has been improperly invoked. For example, the

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[28] *East Attucks Cmty. Hous., Inc. v. Old Republic Sur. Co.*, 114 S.W.3d 311 (Mo.Ct. App. 2003)(while recognizing that an insured's refusal to answer questions under oath as to underlying facts of the claim can bar recovery, because the court found that the insured was not the individual employee unless that employee was found to be the insured's alter ego, which was still a disputed issue of fact, summary judgment in favor of the insurer was held improper).

[29] *Rogers v. Webster*, 776 F.2d 607, 611 (6th Cir. 1985).

[30] *North River Ins. Co. v. Stefanou*, 831 F.2d 484, 486 (4th Cir. 1987); *National Life Insurance Company v. Hartford Accident and Indemn. Co.*, 615 F.2d 595 (3 Cir. 1980); *In re Livent, Inc. Noteholders Sec. Litig.*, 151 F.Supp. 2d 371, 443-44 (S.D.N.Y. 2001)(holding that defendants' blanket assertion of Fifth Amendment improper but denying Plaintiff's motion for judgment on the pleadings).

court in *In re Livent, Inc. Noteholders Sec. Litigation, supra*, granted Plaintiff's motion to strike the defendants' answer who had made a blanket assertion to the entire complaint. The court held that the invocation to be overly broad and unnecessary, and further ordered defendant to go through the complaint to determine the validity and necessity of the Fifth Amendment assertion with respect to each allegation. An improper blanket assertion of the Fifth Amendment may also resulting in a finding of waiver of such privilege.

Parties who file complaints or assert counter-claims or cross claims may also try to rely on the Fifth Amendment's protections. The filing of a claim in of itself will not constitute a waiver of the Fifth Amendment privilege. However, disputes often arise during the litigation when the defendant-in-counterclaim or third-party defendant propounds discovery relating to the incidental action and the plaintiff responds by invoking the Fifth Amendment. Courts have dealt with this scenario in two ways: either dismissing the claim entirely or applying a balancing test. Where the courts opts to dismiss the claim, it is usually under the principle that a party cannot bring an action against another and then prevent the defendant from conducting discovery on the claim.[31] Because dismissal of a claim is an extreme remedy, other courts have applied a balancing test, seeking to preserve a party's constitutional right against self-incrimination while seeking to lessen the prejudice that results when the defendant is prohibited from conducting discovery as a result of the Fifth Amendment's invocation. In applying the balancing test, a court may stay an action until parallel criminal proceedings are completed or the threat of such proceedings have expired.[32]

Even more than the pleading stage, the invocation of the Fifth Amendment is often seen during the course of discovery. If the context of fidelity cases, the Fifth Amendment is often raised by the defalcating employee, co-conspirators, and witnesses afraid of being implicated in a crime. Those who invoke the Fifth Amendment in opposing discovery, however, will bear the burden of establishing its application.[33]

As discussed part IV, discovery related to the production of documents can be met with invocations of the Fifth Amendment. Where directed to a party, a request for production of

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[31] See *Lyons v. Johnson*, 415 F.2d 540, 542 (9th Cir. 1969); *Geldback Transport, Inc. v. Delay*, 443 S.W.2d 120, 121 (Mo. 1969).

[32] *Brumfield v. Shelton*, 727 F.Supp. 282, 284 (E.D.La. 1989)(in a case where there is a real and appreciable risk of self-incrimination, an appropriate remedy would be a protective order postponing civil discovery until termination of the criminal action. When the criminal investigation parallels ongoing civil action, the court, using a balancing approach, has determined the appropriate remedy is a stay of discovery that might expose the party to a risk of self-incrimination); *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084 (5th Cir. 1979)(staying case until statute of limitations period on potential criminal charge expired).

[33] *Estate of Fisher v. Commissioner of IRS*, 905 F.2d 645, 649 (2d Cir. 1990)(when the danger of self-incrimination is not readily apparent from the implications of the questions asked or the circumstances surrounding the inquiry, the burden establishing its existence rests on the person claiming the privilege).

documents should be met with a written objection to the specific request. If directed to a non-party, the non-party may file objections to the subpoena or file a motion to quash. Where raised, those seeking to avoid production of documents may not make a generalized objection to the discovery requests or subpoena but will be required to make specific claims of privilege with respect to each document request.[34] Yet even if properly raised, the party seeking to avoid production of documents must demonstrate that the documents sought fall within the scope of the Fifth Amendment privilege. Records kept in a representative capacity will not be subject to Fifth Amendment protection even though the production of such documents may tend to incriminate one personally.[35] Further, the Fifth Amendment cannot be used in a civil proceeding to resist production of documents that have already been produced in connection with a criminal proceeding.[36]

Interrogatories and requests for admission directed to a party may be subject to a proper objection on Fifth Amendment grounds. A party who reasonably believes that responding to an interrogatory may incriminate himself may invoke his Fifth Amendment privilege by invoking such privilege specifically to each individual request. As with requests for production, a corporation may not simply refuse to respond to interrogatories on Fifth Amendment grounds. However, because an officer of a corporation may properly invoke the privilege if responding would incriminate him personally, the corporation should find a representative who can respond on behalf of the corporation without any danger of incrimination.[37] Any corporate representative who responds on behalf of a corporation, but who does not preserve any personal privilege against self-incrimination, may find later that his privilege has been waived with regard to the subject matter of the responses.[38]

For all the foregoing discovery requests, parties and non-parties should seek to raise their objections timely to discovery requests that may impinge on the privilege against self-incrimination. While courts often look to the merits of whether the Fifth Amendment privilege was properly raised, failing to timely raise the objection will likely give rise to arguments that the privilege was waived.

B. Depositions

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[34] *North River Is. Co. v. Stefanou*, 831 F.2d at 486-487.

[35] *Rogers v. United States*, 340 U.S. 367, 372 (1951)(books and papers kept in representative capacity as opposed to personal capacity cannot be the subject of a personal privilege under the Fifth Amendment).

[36] *Henry v. Sneiders,* 490 F.2d 315, 317 (9th Cir. 1974)(records of defendant already in hands of federal prosecutors; as a result defendant could not rely on Fifth Amendment to avoid complying with order to produce same documents in civil litigation).

[37] *Priebe v. World Ventures, Inc.*, 407 F.Supp. 1244, 1246 (C.D. Cal. 1976).

[38] *State v. United Cancer Foundation*, 693 N.E.2d 1149, 1151 (Oh. Ct. App. 1997).

The stage at which counsel often sees the invocation of the Fifth Amendment privilege is during depositions. In the fidelity context, the privilege is often raised by the dishonest employee, who may possess important evidence regarding the case. It is important to remember that the Fifth Amendment shields against compelled self-incrimination, not legitimate inquiry. Parties are entitled and should notice the depositions of witnesses even when notified that the witness intends to take the Fifth. Further, if not properly invoked, the Fifth Amendment may be found to have been waived, providing counsel further opportunity to obtain key evidence on questions of coverage.

As much as he/she would like, the deponent who seeks to avoid questioning on Fifth Amendment grounds cannot just show up for a deposition, state his name, plead the Fifth, and then be excused from answering questions. Similar to responding to discovery, there is no such thing as a blanket claim of the Fifth Amendment privilege to deposition questioning.[39] Instead, the witness must appear and assert the Fifth Amendment privilege as to each specific questions that is asked which creates a risk of self-incrimination.

The extent a deponent will respond to questioning may turn on whether he is represented by counsel at the deposition. On one hand, a witness may be aided by counsel's guidance at which questions are appropriate and can be safely answered. However, an attorney's presence may also encourage a witness to refrain from any questions, even innocuous ones. Where unrepresented by counsel, a witness may inquire about his rights regarding questioning. However, attorneys representing the surety and other parties should refrain from providing such witness any advice on ethical grounds.

A witness who invokes the Fifth Amendment privilege is not exonerated from answering merely because he declares that his answer would tend to incriminate him.[40] The determination of whether the privilege has been properly asserted rests with the trial judge.[41] Unless the danger of self-incrimination is readily apparent, the burden of proving that the danger exists lies on the claimant. It is important to remember that the court cannot effectively determine whether a responsive answer to a question or an explanation of why it cannot be answered might be incriminating except in the context of a propounded question.[42] Thus, while the process of repeatedly asking questions to which you only get an invocation of the Fifth Amendment may seem like a tiresome exercise, it is necessary. If counsel fails to put all questions on the record, a court will likely find it impossible to evaluate whether the Fifth

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[39] *Hoffman*, 341 U.S. at 486.

[40] *Hoffman*, *Id.*

[41] *Hoffman*, 341 U.S. at 487.

[42] *Id*.

Amendment was properly invoked. The court may also find that a motion to compel a witness' testimony is premature.[43]

Once the issue of whether the witness properly invoked his Fifth Amendment rights gets in front of a judge, the judge is to review the questions posed and determine whether answers to the questions might tend to reveal that the witness has engaged in criminal activities.[44] If answering the questions might incriminate the witness, the court must next ask whether there is a risk, even a remote risk, that the witness will be prosecuted for the criminal activities that his testimony might touch on. When the witness can demonstrate any possibility of prosecution which is more than fanciful he has demonstrated a reasonable fear of prosecution sufficient to meet constitutional muster.[45]

A decision from the U.S. District Court for the Western District of Louisiana, *Coushatta Tribe of Louisiana v. Abramoff*, involving litigation connected to the Jack Abramoff scandal recently confronted the issue of whether the witness, Michael Scanlon, had properly invoked his Fifth Amendment rights.[46] In an insurance coverage dispute between Greenberg Traurig and its professional liability insurers, the insurers sought to depose Michael Scanlon. While Scanlon, who had already pled guilty to federal criminal conspiracy charges involving the corruption of public officials and defrauding clients, answered many questioned posed to him, he refused to answering questions regarding information he had disclosed to attorneys during a January 2004 meeting, asserting his Fifth Amendment rights. In reviewing whether Scanlon had properly invoked the Fifth Amendment, the court found that the insurer defendants sought to compel Scanlon to testify about criminal conduct he engaged in with Abramoff. While the insurer asserted that they merely sought testimony about what Greenberg knew about the criminal enterprise between he and Abramoff as set forth in Scanlon's Rule 11 Factual Stipulation supporting his plea, the court found that the information sought could potentially contain incriminating contents of conversations Scanlon had with third parties which were not mentioned in Scanlon's plea agreement. The court further noted that Scanlon had not yet been sentenced and therefore any incriminating testimony elicited from Scanlon in the action could be considered an aggravating factor warranting an imposition of a harsher sentence. Further, while Scanlon had gotten immunity from the DOJ and U.S. Attorney's office for the Southern District of Florida as part of his plea agreement, the court noted that there was no prohibition of any other state or federal authority from initiating prosecution. As such, the court

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[43] See *FEMIA v. McLaughlin*, 126 F.R.D. 426, 431 (D. Mass 1989)(holding that Plaintiff's counsel motion to compel based on grounds of waiver was premature as he suspended deposition based on assumption that witness would invoke Fifth Amendment rights to all questions and failed to proffer questions on deposition record.)

[44] *In Re Corrugated Container Anti-Trust Litigation*, 620 F.2d 1086, 1091 (5th Cir. 1980).

[45] *Id.*

[46] *Coushatta Tribe of Louisiana v. Abramoff*, *supra.*

ruled that Scanlon had demonstrated a reasonable fear of prosecution and thus had properly invoked the Fifth Amendment privilege.

Even if the deponent has ground to properly invoke the Fifth Amendment privilege, counsel should pay special attention to what information and/or evidence the deponent discloses. Voluntary disclosure of evidence can also help counsel establish a finding of waiver, precluding such witness from attempting to rely on a Fifth Amendment privilege at later stages in the proceedings, as discussed further below.

C. Waiver

A common tactic of dealing with a party or witness' invocation of the Fifth Amendment privilege is to argue that the right has been waived. Any witness who fears the possibility of criminal prosecution must be careful not to inadvertently waive the protections afforded by the Fifth Amendment. As a constitutional guarantee, waiver of the Fifth Amendment is not lightly be inferred. Courts are instructed to indulge every reasonable presumption against waiver.[47] However, waiver of the Fifth Amendment may result from explicit acts or by inference and may be lost if it is not asserted at the earliest possible time.[48] While establishing waiver may prove challenging, it may provide the means of obtaining evidence that is crucial to one's case.

The privilege against self-incrimination in a civil proceeding is not waived or extinguished by entry of a guilty plea in a criminal proceeding. The Supreme Court in *Mitchell v. United States* explained that a "guilty plea is more like an offer to stipulate that a decision to take the stand" and that the "purpose of Rule 11 is to inform the defendant of what he loses by foregoing the trial, not to elicit a waiver of the privilege for proceedings still to follow."[49] Further, "the privilege attaches to the witness in each case in which he is called upon to testify without reference to his declarations at some other time or place or in some other proceeding."[50]

Waiver may be inferred from a witness' voluntary conduct with respect to a subject matter of the litigation. Voluntary disclosure of an incriminating fact waives the privilege as to the fact and all other relevant facts where no further incrimination would result.[51] "Where a

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[47] *Smith v. United States*, 337 U.S. 137, 150 (1949).

[48] *Maness v. Meyers*, 419 U.S. 449, 466 (1975).

[49] *Mitchell v. United States,* 526 U.S. 314, 324 (1999).

[50] *Poretto v. United States*, 196 F.2d 392, 394 (5th Cir. 1952).

[51] *Rogers v. United States*, 340 U.S. 367, 374 (1951).

witness has voluntarily answered as to materially [in]criminating facts . . . he cannot then stop short and refuse further explanation, but must disclose fully what he has attempted to relate."[52] The Fifth Amendment privilege cannot be invoked to avoid disclosure of the details where incriminating facts have already been revealed.

Although voluntary testimony regarding an incriminating fact will waive the privilege as to the details, waiver does not occur where further disclosure carries a risk of incrimination beyond that raised by the previous testimony.[53] Courts have recognized:

> An ordinary witness may pick the point beyond which he will not go, and refuse to any questions about a matter already discussed, even if the facts already revealed are incriminating, so long as the answers sought may tend to *further* incriminate him.[54]

Thus, where a witness does testify to materially criminating facts, the court is required to examine each later question to which the privilege is asserted to determine whether the question presented a reasonable danger of further incrimination in light of all the circumstances including any previous disclosures.

Waiver of the Fifth Amendment may also be implied.[55] While this finding is disfavored, waiver will be implied or inferred if (1) the witness' prior statements have created a significant likelihood that the finder of fact will have a distorted view of the truth; and (2) the witness had reason to know that his prior statement would be interpreted as a waiver of the Fifth Amendment's privilege against self-incrimination.[56]

In addition to testimony given by a witness, voluntary production of documents[57] or untimely objection to discovery requests, including request for production of documents and

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[52] *Rogers v. United States*, 340 U.S. at 373-374.

[53] *In Re Master Key* Litigation, 507 F.2d 292, 294 (9th Cir. 1974); *Shendal v. United States*, 312 F.2d 564, 566 (9th Cir. 1963); *In re Gi Yeong Nam*, 245 B.R. 216, 227 (Bankr. E.D.Pa. 2000).

[54] *Shendal v. United States*, *Id.*.

[55] Glen DeValerio, Kathleen M. Donovan-Maher, Julie Richmond, *Implications of Pleading the Fifth Amendment in Securities Fraud Class Action*, Securities Litigation, ALI-ABA Course of Study Materials (May 2004).

[56] *Klein v. Harris*, 667 F.2d 274, 287-88 (2d Cir. 1981); *Emspak v. United States*, 349 U.S. 190, 197-198 (1955).

[57] *In re Lederman*, 140 B.R. 49, 53-55 (Bankr. E.D.N.Y. 1992).

interrogatories[58] may result in a finding of waiver. While several courts have disregarded challenges to invocations of the Fifth Amendment on grounds of waiver, choosing instead to examine the merits of the assertion, the Supreme Court has acknowledged that the Fifth Amendment privilege is a right that "might be lost by not asserting it in a timely fashion."[59]

The question of waiver also often arises where a party has filed an affidavit in support of a motion at the pleading stage. Because an affidavit is akin to testimony, a party may be found to have waived his Fifth Amendment privilege as to the subjects contained in the affidavit. For example, in *Nutramax Laboratories, Inc. v. Twin Laboratories*, where an officer of a defendant corporation submitted two affidavits in support of a motion to correct the record, the officer was found to have waived his Fifth Amendment privilege on matters raised in his affidavits and could be compelled to submit to deposition questioning on those subjects.[60]

D. Consequences of Invocation of the Fifth Amendment and Trial Concerns:

While the Fifth Amendment is designed to protect a witness from self-incrimination its invocation can have significant ramifications in civil litigation. A party cannot be found liable solely because of reliance on the Fifth Amendment as this would be tantamount to the imposition of a penalty for the exercise of the privilege. However, courts often take pains to limit the prejudice resulting to others as a result of the invocation of the Fifth Amendment privilege. These "remedies" may include rulings by the court limiting a party's defenses or their ability to engage in discovery or offer evidence.[61] Another significant consequence of the invocation of the Fifth Amendment is the possibility of the adverse inference, where the party who has been disadvantaged by the opposing parties' invocation of the privilege is permitted to share with the jury the fact that such privilege has been invoked and argue that the party's silence is evidence of his guilt. In addition to a party's invocation of the Fifth Amendment, a non-party witness' invocation of the Fifth Amendment, where employed by or who is associated with the party, is potentially admissible against such a party.

1. Consequences of Invocation

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[58] *Maness v. Meyers*, 419 U.S. at 466; *Starlight Int'l v. Herlihy*, 181 F.R.D. 494, 497-98 (D. Kan. 1998)(stating that Fifth Amendment can be waived if untimely raised but that court may use discretion to consider the merits of the claim).

[59] *Maness v. Meyers*, *Id.*

[60] 32 F.Supp. 2d , 331 (D.Md. 1999)

[61] Richard L. Scheff, Scott Coffina, Jill Baisinger, Taking the Fifth in Civil Litigation, American Bar Association, March 2003.

The invocation of one's Fifth Amendment rights usually does not come without cost in a civil proceeding. A defendant is often forced to invoke the Fifth Amendment in civil litigation out of fear that a response may lead to criminal liability and after efforts of obtaining a stay of discovery has failed. A defendant's invocation of his privilege against self-incrimination often results in preventing the plaintiff in civil litigation from obtaining information and making evidence unavailable or perhaps more difficult to discover. Additionally, the plaintiff may be precluded from learning the basis for defendant's assertions, including the facts relied upon to deny the petition's allegations and the facts upon which affirmative defenses are based.[62] Courts are thus often willing to help offset the prejudice to a party resulting from another's invocation of the Fifth Amendment.

One of the remedies that a court might employ where the Fifth Amendment has been invoked is to preclude the party who invoked the Fifth Amendment from introducing evidence that he withheld during discovery. Some courts even go so far as to issue a total preclusion order –[63] preventing the defendant from offering into evidence any matter relating to the factual basis of his denials and defenses as to which a Fifth Amendment privilege was based even if the plaintiff obtained it prior to trial. Other courts will preclude the defendant from using any evidence withheld under the right against self-incrimination, but permit "outside discovered evidence" to be used.[64] Another remedy which courts employ is precluding the invoking defendant from testifying.[65]

The consequences of invocation of the Fifth Amendment often become apparent where summary judgment motions are filed and the invoking party attempts to file an affidavit in support of his opposition. Where a party invokes the Fifth Amendment to avoid responding to discovery, courts generally prohibit such party from withdrawing the assertion and filing affidavits offered in support of their opposition to a motion for summary judgment filed against such party.[66] Courts may strike such affidavits when submitted or use such affidavit as

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[62] ABA SECTION OF ANTITRUST LAW, THE RIGHT AGAINST SELF-INCRIMINATION IN CIVIL LITIGATION (2001), at 79, *citing SEC v. Cymaticolor Corp*., 106 F.R.D. 545, 549-50 (S.D.N.Y. 1985).

[63] *SEC v. Cymaticolor Corp*., 106 F.R.D. at 550; *SEC v. Benson*, 657 F.Supp. 1122,1129 (S.D.N.Y. 1987) (holding that the defendant had forfeited the right to offer evidence disputing the plaintiff's evidence or supporting his own denials).

[64] *City of Chicago v. Reliable Truck Parts Co*., 822 F.Supp. 1288, 1293-1294 (N.D.Ill. 1993)(precluding defendants who asserted their Fifth Amendment privilege from submitting their own testimony or affidavits, but permitting any party to use documents previously produced in the course of the litigation).

[65] *United States v. Talco Contractors, Inc.,* 153 F.R.D. 501 (W.D.N.Y. 1994)(ordering that defendant would be precluded from testifying in the action unless he agreed to testify at deposition); *SEC v.Drexel Burnham Lambert, Inc*., 837 F.Supp. 587, 605, n. 6 (S.D.N.Y. 1993)(entering a preclusion order preventing defendants from testifying on issues which they previously refused to answer on Fifth Amendment grounds).

[66] *SEC v. Hirshberg*, 1999 U.S. App. LEXIS 4764, *5-6 (2d Cir. 1999)(upholding striking of the defendant's

evidence of waiver of the right against self-incrimination, thereby making the invoking defendant subject to deposition.[67] However, a plaintiff will not be able to obtain summary judgment against the defendant merely because he invoked his Fifth Amendment privilege. The evidence produced by a non-moving party's silence is not sufficiently weighty to carry a moving party's burden. In other words, the plaintiff's motion for summary judgment must stand or fall on the merits of the evidence adduced.[68]

Plaintiffs who bring an action but then invoke the Fifth Amendment also have faced the consequences of asserting the Fifth Amendment privilege. Courts have recognized that a voluntary litigant cannot use the Fifth Amendment both as a sword and a shield.[69] The shield provided by the Fifth Amendment cannot provide a sword to litigants for achieving their claims without having to "conform to the process necessary to orderly and equal forensic functioning."[70] Thus, a party bringing a claim cannot institute suit and then prevent the party defending the action from learning anything about the action through discovery by invoking the Fifth Amendment privilege against self-incrimination. Courts have recognized that a court may dismiss a claim or a counterclaim brought by a litigant who refuses to submit to discovery on his claim by invoking the Fifth Amendment privilege against self-incrimination even if a motion to compel discovery has not been issued and violated.[71] However, many courts view dismissal of the litigation as an "extreme" sanction which must be a sanction of the last, not first resort."[72] In this event, a court may consider a stay of discovery in the civil matter.[73] Alternatively, a court may an allow adverse inference to be drawn against a party that invokes the Fifth

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affidavit in opposition to summary judgment motion based on earlier invocations of privilege during discovery); *United States v. Parcels of Land*, 903 F.2d 36, 43-44 (1st Cir. 1990)(*same)*; *Dunkin Donuts, Inc. v. Taseki*, 47 F.Supp. 2d 867, 872-73 (E.D. Mich. 1999)(prohibiting defendant from presenting evidence on damages in opposition to summary judgment motion where he refused to respond to questions regarding damages at deposition).

[67] *In re Edmond*, 934 F.2d 1304, 1308-1309 (4th Cir. 1991).

[68] *United States v. Rylander*, 460 U.S. 752, 758 (1983)(while the assertion of the Fifth Amendment may be a valid ground upon which a witness declines to answer a question, it has never been thought to be in itself a substitute for evidence that would assist in meeting a burden of production); *Fidelity Funding of California, Inc. v. Reinhold*, 79 F.Supp.2d 110, 116 (E.D.N.Y. 1997).

[69] *Lyons v. Johnson*, 415 F.2d 540, 542 (9th Cir. 1969).

[70] *Id.; See also Wehling v. Columbia Broadcasting System*, 608 F.2d 1084, 1087 (5th Cir. 1980).

[71] *Stop and Shop Cos. v. Interstate Cigar Co., Inc*. 110 F.R.D. 105, 107-108 (D.Mass. 1986); *Continental Assurance Company v. Lombardo*, 1988 U.S. Dist LEXIS 253, * 4 (E.D.Pa. 1988).

[72] *Wehling*, 608 F.2d at 1087 (when plaintiff's silence is constitutionally guaranteed, dismissal is appropriate only where other, less burdensome remedies would be an ineffective means of protecting unfairness to the defendant).

[73] *Id.*

Amendment privilege in order to prevent the "use of the privilege as a weapon in civil litigation."[74]

2. Trial Concerns

The potential of a witness' invocation of the Fifth Amendment similarly presents issues of concern at the trial stage. While the Fifth Amendment is applicable in the civil context, a witness who seeks to avoid questioning cannot simply refuse to attend the trial and/or assert a blanket refusal to testify. The trial may also present issues of waiver. Where a party voluntary testifies, such witness may find his right to plead the Fifth on cross-examination waived.

In contrast to invocations of the Fifth Amendment in criminal proceedings, the Fifth Amendment privilege against self-incrimination does not preclude the jury from drawing an adverse inference where the privilege is claimed by a party to a civil cause. The adverse inference provides that if the invoking party had testified, that testimony would have been unfavorable to his case. The adverse inference allows a civil plaintiff to moderate the disadvantage faced when he is unable to obtain information due to a witness' assertion of his Fifth Amendment privilege.[75] Where this occurs, a jury may be instructed that it may draw an adverse inference with respect to all matters to which the party asserted his Fifth Amendment rights when they refuse to testify in response to probative evidence offered against them.[76]

There is no rule, however, that a jury must learn of a party or witness' invocation of the Fifth Amendment. The court generally has significant discretion in deciding whether to admit to preclude evidence of a witness' invocation of the Fifth Amendment.[77] If the court does permit a witness to invoke the Fifth Amendment before the jury, the fact finder, may, but is not required to draw an adverse inference from it. The extent to which an adverse inference may be drawn will also depend on the jurisdiction. Some courts allow an inference to be drawn from a non-party witness' invocation of the Fifth Amendment,[78] while other courts only permit

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[74] *Penfield v. Venuti*, 589 F.Supp. 250, 254 (D.Conn. 1984).

[75] *SEC v. Musella,* 578 F.Supp. 425, 429 (S.D.N.Y. 1984).

[76] *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1975) (the Fifth Amendment does not forbid an adverse inference against parties to civil actions when they refuse to testify in response to probative evidence offered against them).

[77] *SEC v. Colello*, 139 F.3d 674, 677 (9th Cir. 1988)(holding that court is free to fashion whatever remedy is required to prevent unfairness when the invocation of the privilege prejudices another party); *Wehling*, 608 F.2d at 1089; *FDIC v. Fid. & Deposit Co. of Maryland*, 45 F.3d 969, 977 (5th Cir. 1995).

[78] *Brinks, Inc. v. City of New York*, 717 F.2d 700, 707-710 (2d Cir. 1983); *Rosebud Sioux Tribe v. A&P Steel, Inc.*, 733 F.2d 509, 522 (8th Cir. 1984); Heidt, The Conjurer's Circle: The Fifth Amendment Privilege in Civil Cases, 91 Yale L.J. 1062, 1087-88, 1107-35 (1982).

adverse inference where the Fifth Amendment is invoked by a party.[79] However, even where the adverse inference is permitted to be drawn, the adverse inference, alone, will not satisfy a party's burden of proof. Courts generally require that the party supporting the inference present corroborating evidence.[80] "Silence alone is insufficient to support an adverse decision."[81]

The question of adverse inference can be especially challenging where a non-party employee or former employee invokes the Fifth Amendment. Before an adverse inference is authorized, a court may require some relationship between the witness and the party against whom the inference is to be drawn be established. Courts appear most comfortable with permitting an adverse inference based on a non-party invocation of the Fifth Amendment where the non-party is an employee, officer, or agent of the party at the time the testimony is given. Other courts use a number of factors in determining whether it is appropriate to use the adverse inference, including: (1) the nature of the relevant relationships (*i.e.*, the loyalty between plaintiff or defendant and the non-party witness); (2) the degree of control of the party over the non-party witness; (3) the compatibility of the interests of the party and non-party witness in the outcome of the litigation; and (4) the role of the non-party witness in the litigation.[82] In applying this test, the overarching concern is fundamentally whether the adverse inference is trustworthy under all of the circumstances and will advance the search for truth.

If counsel wishes to avoid having the jury learn of the witness' invocation of the Fifth Amendment, he may be able to convince a court to exclude it under Rule 403 of the Federal Rules of Evidence. If counsel is aware that a particular witness is likely to invoke the Fifth Amendment based on his prior conduct during the discovery phase, counsel is advised to make the court aware about the potential of the witness' invocation and request that the witness be questioned initially outside the jury's presence. If permitted and the Fifth Amendment is invoked during questioning, counsel can then seek a protective order prohibiting any mention of the Fifth Amendment. A court should use a evidentiary balancing test in weighing whether to exclude such evidence, deciding whether the probative value of the

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[79] *Economy Auto Salvage, Inc. v. Allstate Ins. Co.*, 499 So.2d 963, 977 (La.App. 3 Cir. 1986); *LaSalle Bank Lake View v. Seguban*, 54 F.3d 387, 391 (7th Cir. 1995).

[80] *Baxter v. Palmigiano,* 425 U.S. 308, 317 (1976); *FDIC v. Fid. & Deposit Co. of Maryland*, 45 F.3d 969, 978 (5th Cir. 1995); *Avigan v. Hull*, 932 F.2d 1572, 1580 (11th Cir. 1991); *Koester v. American Republic Invs., Inc.*, 11 F.3d 818, 823-24 (8th Cir. 1993).

[81] *Koester*, 11 F.3d at 824, *citing Baxter v. Palmigiano*, 425 U.S. at 317-318.

[82] *LiButti v. United States*, 107 F.3d 110, 122 (2d Cir. 1997). Under the first factor, the closer the relationship, the lower likelihood that the non-party witness would invoke in order to damage the relationship. Under the second factor, the court is to focus upon whether the degree of control is sufficient to allow the invocation to function as a vicarious admission. The third factor considers whether the non-party is a party in interest and whether the assertion of the privilege advances the interest of the non-party and the affected party. The fourth factor evaluates whether the non-party played a key role with respect to any aspects of the litigation. *Id.*

invocation outweighs the danger of unfair prejudice.

The question of the proprietary of the adverse inference has been the subject of a number of fidelity cases. In *Ralph Hegman Co. v. Transamerica Ins. Co.*,[83] a Minnesota court permitted an adverse inference to be drawn against the fidelity insurer where the principal, a co-defendant, invoked the Fifth Amendment. The court found a relationship between the principal and the insurer, ruling that because Transamerica insured the plaintiff against any loss resulting from dishonesty or fraud on the part of the employee, it had assumed certain responsibilities for the employee's acts. The court reasoned that if the jury could properly draw inferences against the employee because of his assertion of the privilege, there was no reason to preclude the jury from drawing the same inferences in considering an identical claim of the plaintiff against Transmerica.

Similarly, in *First National Bank of Louisville v. Lustig*, the insurers sought to exclude any reference to the two witness' refusal to answer questions on Fifth Amendment grounds at their depositions. The insurers argued that the witness' blanket invocation of the Fifth Amendment was ambiguous and meaningless regarding whether the such witness engaged in dishonest or fraudulent conduct as those terms are defined by the bond. The insurers also raised the danger of unfair prejudice because conduct that would give rise to criminal prosecution and conduct necessary for coverage under the bond were distinct. In refusing to preclude such evidence, the court explained:

> Admitting reference to the privilege invocations tends to explain why the witnesses are not testifying at trial and suggests that the witness may have something to hide. The court recognizes that invocations of the privilege have limited probative value on bond coverage. However, the court finds that reference to the invocation is not unfairly prejudicial because counsel may attempt to explain them. Additionally, the court will consider a jury instruction on this issue, should the parties deem it appropriate.[84]

Thus, the court ruled that references could be made to the witnesses' invocations of the Fifth Amendment during the depositions but barred as unfairly prejudicial any reference to any specific questions asked during the depositions.

Another leading case on the question of the adverse inference in the fidelity context is *Federal Deposit Insurance Corp v. Fidelity & Deposit Company of Maryland*, wherein the FDIC,

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[83] 198 N.W.2d 555, 558 (Minn. 1972).

[84] 87-5488, 1993 WL 411260 (E.D.La. 10/7/93).

as the bank's receiver, sought to recover under a fidelity bond.[85] F&D argued that the trial court improperly permitted the jury to draw an adverse inference against a party as a result of a non-party's witness invocation of the Fifth Amendment. F&D expressed concern that the jury had found that the covered employee had committed dishonest acts solely on the basis of his association with witnesses who had invoked the Fifth Amendment. The Fifth Circuit, however, concluded that because the Fifth Amendment "does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them," there was no reason "to adopt a rule that would categorically bar a party from calling as a witness, a non-party who had no special relationship to the party, for the purpose of having that witness exercise his Fifth Amendment right." The court ruled, however, that before an adverse inference can be drawn from the witness' invocation of the privilege, there must be evidence corroborating the inference to be drawn from the witness' invocation of the privilege. Under a 403 balancing test, the Fifth Circuit found that any undue prejudice F&D might have faced was avoided by a limiting instruction given by the trial judge to the jury advising that it could not base any finding of liability solely on the witness' invocation of the Fifth Amendment privilege.

The foregoing cases make clear that the surety faces a real danger of the court permitting the jury to draw an adverse inference against it from a witness' invocation of the Fifth Amendment. Such adverse inference may be drawn against the surety even in jurisdictions that specifically require a showing of a relationship between the witness and the party against whom the inference is to be drawn, finding that a dishonest employee's invocation may be used to draw an adverse inference against the surety. In such instances, where the person invoking the privilege is a non-covered co-conspirator or mere witness, the requisite relationship required for such inference should be found lacking.

Having a plan of action and being well prepared at trial for the possible consequences of a witness' invocation of the Fifth Amendment is imperative. Here are some practical tips:

1. Counsel should be familiar with the court's holdings with respect to Fifth Amendment invocations.

2. Where is it is likely that a witness may invoke the Fifth Amendment, the surety should seek to prohibit such witness from testifying at all, arguing that such testimony and the invocation of privilege is irrelevant as to bond coverage. The insurer should further contend that the danger of the jury impermissibly drawing a negative inference from the witness invocation will likely result in unfair prejudice to the insurer that far outweighs any probative value of such evidence.

[85] 45 F.3d 969, 977-979 (5th Cir. 1995).

3. Alternatively, the insurer should argue that such testimony should at least be first questioned outside of the presence of the jury, permitting the insurer to argue once again how the witness' testimony is irrelevant and unfairly prejudicial.

4. If the court permits testimony of a witness' invocation of the Fifth Amendment privilege before the jury, the fidelity insurer should seek to limit the effect of the invocation, including arguments that the witness is not a party, there is no relationship between the witness and the insurer, and that corroborating evidence is lacking. The availability of such arguments, of course, will depend on the court's applicable precedent.

5. The surety can also request that the court give a limiting instruction to insure that the jury does not draw an impermissible inference from the invocation.

6. Counsel should also make sure to preserve objections for possible appeal.

VI. Conclusion

In a fidelity case, it is not uncommon to see key factual witnesses clam up and assert their Fifth Amendment privilege. This invocation may come from the dishonest employee, co-conspirators or even mere witnesses. Counsel for the surety should therefore be prepared for such invocations and have a plan of action for dealing with Fifth Amendment dilemmas. It is important to insist that any invocation of Fifth Amendment in the discovery or pleading stage be done with specificity. If the witness attempts a blanket assertion or claims the privilege with respect to non-incriminating questions, counsel should be prepared to take the matter to court for review. If the witness elects to produce some information or documents, but then attempts to assert his Fifth Amendment privilege, counsel should evaluate whether the prior responses could be deemed a waiver of such privilege. In any event, counsel should always seek out alternative methods to obtain relevant information and documents, such as contacting witnesses' counsel or even by attempting to obtain evidence from criminal investigators or prosecutors.

At trial, counsel should try to prevent the jury from learning of prior invocations of the Fifth Amendment. If the jury is informed of an invocation, or if the witness pleads the Fifth on the stand, counsel should argue that no inference should be drawn against the insurer from the invocation.

Biography:

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