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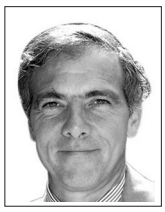
WHITE-COLLAR CRIME

Expert Analysis

Implications of Asserting The Fifth Amendment



By **Robert G. Morvillo**

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The breadth and reach of federal criminal statutes, such as mail and wire fraud, conspiracy, money laundering and securities fraud pose a danger to defendants charged in civil cases with some form of misconduct. The danger is especially acute when a parallel criminal investigation is ongoing or the realistic threat of one exists. This is particularly true in SEC cases as virtually every intentional violation of the federal securities laws is actionable both civilly and criminally.

Criminal defense attorneys frequently advise their clients to consider asserting their Fifth Amendment privilege as a protection in such cases. This is a particularly difficult judgment call in view of the fact that some assertions of the privilege can be used as evidence in a civil proceeding, often hamstringing the ability to defend in those cases. Many corporations also look askance at such invocations and terminate employees who rely upon this important constitutional right.

In complex white-collar matters, clients may be requested to testify before Congress or a regulatory agency such as the Securities and Exchange Commission, or be deposed in a civil suit. Of course, the privilege against self-incrimination may be asserted in any civil, criminal or administrative proceeding, without adverse consequences in a criminal case.

Courts, however, may draw some type of adverse inference when a party to a civil case asserts the Fifth Amendment. In *Baxter v. Palmigiano*,[1] the Supreme Court held that the Fifth Amendment does not "preclude the inference where the privilege is claimed by a party to a civil cause" in response to probative evidence offered against them. However, courts still are required to examine whether undue prejudice exists in allowing such an inference, an analysis about which little is written. Where no prejudice results, Baxter essentially sets forth two criteria for drawing an adverse inference from the assertion of Fifth Amendment rights: 1) whether the assertion occurred in an actual civil case; and 2) where the assertion was made offered against the person seeking the Fifth Amendment protection. Again, these tests are rarely explored in the case law.

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Undue Prejudice

The U.S. Court of Appeals for the Second Circuit has held that evidence regarding a party's assertion of the Fifth Amendment is admissible where the probative value is not substantially outweighed by the danger of unfair prejudice.[2] The circuit has recognized that in certain circumstances an adverse inference should not be allowed, even if the proceeding is civil in nature. In *United States v. One Parcel of Property Located at 15 Black Ledge Dr.*,[3] the government requested that an adverse inference be drawn against the property owner in a civil forfeiture proceeding because she previously had asserted the privilege against self-incrimination in a deposition. Although authority allowing for such an inference in civil forfeiture proceedings existed, the circuit court opined that the permissibility of such an adverse inference, where serious deprivations such as someone's property, is at risk, "pose[d] troubling questions" and may be constitutionally impermissible. Ultimately, the court found it unnecessary to rule on the issue in the context of this case, leaving it for another day.

The Second Circuit also has held that it is improper for a court to rely on an adverse inference, drawn from a party's previous invocation of the Fifth Amendment, in ruling on a summary judgment motion. In *Stichting Ter Behartiging v. Schrieber*,[4] former shareholders of a Dutch company which had American subsidiaries sued the attorneys for one such subsidiary alleging malpractice and breach of fiduciary duties. Specifically, plaintiffs asserted that the company's actions in bribing a Panamanian official during a transaction to purchase land in Panama were based on negligent legal advice from counsel. The attorneys argued that plaintiffs were collaterally estopped from arguing that the company relied on their advice by virtue of the conviction of the company and two individual principals for violations of the Foreign Corrupt Practices Act. The district court agreed, granting defendants' motion for summary judgment. The Second Circuit disagreed, vacating and remanding the action.[5]

On remand, Southern District Court Judge Jed Rakoff allowed the parties to move for summary judgment on any ground not previously decided. The defendants

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sought summary judgment on the issues of liability. The court denied these motions and resolved a number of other issues (unrelated to this article) regarding standing and real parties in interest. The case was once again brought before the Second Circuit. One of the issues on appeal was whether the district court's denial of the defendant's motion for summary judgment on the issue of liability was proper. In arguing that no genuine issue of material fact existed, the defendant pointed to the fact that one of the parties had invoked the Fifth Amendment during his deposition and that this assertion should give rise to a negative inference in the defendant's favor. The Second Circuit noted that although a jury may be able to draw such an adverse inference, "we are required at summary judgment to draw all favorable inferences in favor of the non-moving party." Accordingly, the court felt it was inappropriate to rely on an adverse inference in deciding defendant's summary judgment motion.[6]

Southern District Court Judge Robinson made a similar finding in *Parsons & Whittemore Enterprises, Corp. v. Schwartz*.[7] Parsons & Whittemore and its two shareholders brought an action against the corporation's tax attorney seeking damages for fraud and other related charges. In answering the plaintiff's amended complaint, the defendant asserted his Fifth Amendment privilege against self-incrimination. Plaintiffs subsequently filed a motion for summary judgment arguing that the defendant's invocation of the privilege and subsequent refusal to provide deposition testimony did not preclude a finding that no genuine disputes of material fact existed with respect to the defendant's liability.

Citing the Second Circuit's finding in *Stichting Ter Behartiging*, the court noted that it was required to draw all reasonable inferences in favor of the defendant on plaintiff's motion for summary judgment. Accordingly, the court declined to infer adverse meaning from the defendant's assertion of the privilege.

Courts also have considered whether a non-party's invocation of the Fifth Amendment privilege in the course of a civil litigation can allow for an adverse inference to be drawn against a party in the action. In *LiButti v. United States*,[8] the Second Circuit recognized circuit precedent holding that an ex-employee's silence could be attributed to his former employer as a sort of "vicarious admission."[9]

Resisting the idea of a bright line rule, the court found that the circumstances of a given case, rather than the status of a particular non-party witness, determined the admissibility and prejudicial effect of such evidence. In examining the circumstances, a court should determine: 1) the nature of the relevant relationships; 2) the degree of control of the party over the non-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 litiga-tion.[10]

'Baxter' Criteria

Assuming no undue prejudice is found to result from the use of an adverse inference, a court should determine whether the two criteria set forth in *Baxter* are satisfied. *Baxter* makes clear that the assertion of privilege must take place in the context of a civil action. Thus, the nature of the proceeding in which the invocation is made is of utmost importance in determining what inference, if any, is to be drawn from a defendant's invocation of the Fifth Amendment. In *Grunewald v. United States*, the Supreme Court considered the grand jury context, stating:

> The nature of the tribunal which subjects the witness to questioning bears heavily on what inference can be drawn from a plea of the Fifth Amendment. Innocent men are more likely to plead the privilege in secret proceedings, where they testify without advice of counsel and without opportunity for cross-examination, than in open court proceedings, where cross-examination and judicially supervised procedure provide safeguards for the establishing of the whole, as against the possibility of merely partial, truth.[11]

Further, the question arises whether the invocation of the privilege in the context of one civil action can be used in a subsequent civil action to justify the imposition of an adverse inference. One district court in the Northern District of Illinois has held that the Supreme Court's decision in *Baxter* implies that the rule allowing for adverse inferences to be drawn should only apply in the proceeding or case in which the party asserted the Fifth Amendment, not in a separate proceeding.[12] For this reason, the court held that the assertion of the privilege by the defendant in a congressional hearing did not warrant an adverse inference in a later civil action. Although this approach seems like good policy, it has not been applied uniformly.

Some district court cases in the Second Circuit have permitted an adverse inference to be drawn in an enforcement action brought by the Securities and Exchange Commission where the defendant asserted the Fifth Amendment during a precomplaint investigation by the SEC. This has happened even where the defendant subsequently waives the Fifth Amendment and responds to the SEC questions.

In *SEC v. DiBella*,[13] the court granted the government's motion seeking an adverse inference instruction based on

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William A. DiBella's invocation of the Fifth Amendment during a prior investigation conducted by the U.S. Attorney's Office and the SEC. After the possibility of criminal charges were resolved, Mr. DiBella waived his Fifth Amendment rights and submitted to a deposition in the instant case. When asked why he had invoked the privilege during the investigation, Mr. DiBella was instructed by his attorney not to answer the question because it sought privileged information.

When considering the government's request for an adverse inference instruction based on Mr. DiBella's conduct during the earlier investigation, the trial court observed that the Supreme Court justified the use of such inferences because "silence in the face of accusation is a relevant fact… [and] is often evidence of the most persuasive character." In determining

whether such an inference is appropriate, courts have broad discretion in applying such an inference to ensure that parties do not rely on the Fifth Amendment to gain unfair advantage or delay discovery.

In Mr. DiBella's case, the SEC argued that it had been unduly prejudiced by his invocation of the Fifth during its initial investigation because it postponed and prevented necessary fact-finding. The majority of the SEC's case relied upon conversations between Mr. DiBella and others not otherwise memorialized. Hence, Mr. DiBella's refusal to answer questions about those conversations hampered the SEC's fact-finding efforts. In addition, the SEC complained that because of the delay in time, Mr. DiBella's memory had suffered. Finally, the SEC noted that it repeatedly had communicated its intent to seek an adverse inference for Mr. DiBella's assertion of the privilege.

The district court found that the probative value of Mr. DiBella's assertion of the Fifth Amendment outweighed any prejudice to him. Noting his obligation to provide meaningful discovery, the court found it dubious that although Mr. DiBella ultimately waived the privilege and provided deposition testimony, he repeatedly stated that he could not recall specific dates or events as a result of the passage of time. "Allowing the jury to hear evidence of Defendant's invocation of the Fifth Amendment privilege prevents the privilege from being used as a weapon, which furthers the policy behind the inference." In addition, the court opined that any prejudice resulting from the inference was mitigated by Mr. DiBella's ability to show other evidence that his responses would not have incriminated him.[14]

Other courts in this circuit similarly have imposed an adverse inference in an SEC enforcement action based on the defendant's invocation of the Fifth Amendment during a prior government investigation.[15] The criteria set forth in *Baxter*, requiring that the defendant assert the privilege in the context of a "civil cause," appears to run contrary to such findings. Commentators have noted that the "nature" of an SEC investigation bears little resemblance to a civil proceeding and is, in fact, more similar to a grand jury proceeding of the type addressed by the Supreme Court in *Grunewald*. These cases seem to ignore the fact that the assertion of the privilege is not designed to thwart the SEC's fact finding but to protect subjects of criminal investigations often being simultaneously investigated.

Indeed, although an SEC investigation may lead to substantive proceedings, the investigation itself adjudicates no legal rights. Moreover, no procedural safeguards, such as due process requirements, are available in the context of an SEC investigation. None of the "trial-like procedures" that exist in a typical civil case—notice of the charges, an opportunity to present and cross-examine witnesses—are present in an SEC investigation. Accordingly, permitting the inference seems inconsistent with the Supreme Court's statement in *Baxter*.[16]

Further, established case law analyzing when an individual waives the Fifth Amendment supports the notion that implications flowing from the assertion of the Fifth Amendment are limited to the proceeding in which the invocation was made. In other words, the Fifth Amendment is "proceedings oriented," and reliance on the privilege in one proceeding should not have consequence outside that proceeding.

Courts have held that "the waiver of the privilege against self-incrimination in one proceeding does not affect the right of a witness or accused to invoke the privilege as to the same subject matter in another independent proceeding."[17] Two reasons exist for this rule. First, conditions may change between successive proceedings, thereby creating new reasons for the assertion of the privilege. Second, the witness may be subject to different interrogation for different purposes at a subsequent proceeding.

This general acknowledgment that the impact of the Fifth Amendment is proceedings oriented, as well as the Supreme Court's admonition that an adverse inference should only apply where the privilege is asserted in a civil action, undercut those cases applying an adverse inference in an SEC enforcement action based on the defendant's invocation of the Fifth Amendment during a prior SEC investigation. Indeed, the Supreme Court has noted that invoking the privilege should not amount to an automatic penalty for a defendant.[18]

Although the option to seek a stay of a civil proceeding during the pendency of a criminal case exists in some matters, no such option usually exists in the instance of subsequent or parallel noncriminal investigations. Unquestionably, the Fifth Amendment can be abused. The government sometimes permits its co-conspirator witnesses to hide behind it by delaying final judgment in the witness' criminal case and playing ostrich when the witness invokes it in a parallel civil case, despite plea agreement control of the witness and knowledge that the witness will ultimately testify a short while later in the criminal trial. If targets of criminal investigations are penalized by assertions of the Fifth Amendment why are they unable to take advantage of the same propositions when the shoe is on the other foot?

1. 425 U.S. 308 (1976).
2. *Brinks Inc. v. City of New York*, 717 F.2d 700, 710 (2d Cir. 1983).
3. 897 F.2d 97 (1990).
4. 407 F.3d 34 (2d Cir. 2005).
5. 327 F.3d 173 (2d Cir. 2003).
6. 407 F.3d at 55.
7. 387 F. Supp.2d 368 (SDNY 2005).
8. 107 F.3d 110 (2d Cir. 1997).
9. See *Brinks Inc. v. City of New York*, 717 F.2d 700 (2d Cir. 1983).
10. 107 F.3d at 123.
11. 353 U.S. 291, 423 (1957).
12. *Fujisawa Pharmaceutical Co., Ltd. v. Kapoor*, 1999 WL 543166 (N.D. Ill. July 21, 1999).
13. 2007 WL 1395105 (D.Conn. May 8,2007).
14. Id. at *4.
15. See *SEC v. PacketPort.com Inc.*, 2006 WL 2349452 (D.Conn. July 28, 2006); *SEC v. Herman*, 2004 WL 964194 (SDNY May 5, 2004); *SEC v. Cassano*, 2000 WL 1512617 (SDNY Oct. 11, 2000).
16. Carl H. Loewenson, Jr. and Daniel W. Levy, "Taking the Fifth During SEC Probe; Client's Assertion of Rights Should Be Irrelevant in Later Civil Enforcement," New York Law Journal (July 16, 2001).
17. *United States v. James*, 609 F.2d 36, 42 (2d Cir. 1979) (although defendant failed to invoke privilege before FBI and grand jury, he was still entitled to invoke privilege at trial).
18. *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977).