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SOUTHERN DISTRICT CIVIL PRACTICE ROUNDUP

Expert Analysis

Hurdles and Consequences to Asserting The Fifth Amendment in Civil Litigation

By **Edward M. Spiro**

And **Judith L. Mogul**

Although a party or witness in civil litigation may invoke the Fifth Amendment, such invocation often comes at a high price, because, in contrast to the criminal context, the finder of fact in a civil case may draw an adverse inference against the party or witness who declines to provide evidence based on the Fifth Amendment privilege against self-incrimination. We discuss below a number of recent decisions from the Southern District of New York addressing when and how the Fifth Amendment can be invoked in civil litigation, and the ramifications to litigants when parties and non-party witnesses avail themselves of that privilege.

Nuts and Bolts

Although the Fifth Amendment is available in *any* proceeding in which a witness reasonably believes that his or her testimony "could be used in a criminal proceeding or could lead to other evidence that might be so used," the privilege is not available to every litigant or witness in every circumstance. *Andover Data Servs. v. Statistical Tabulating*, 876 F.2d 1080, 1082 (quoting *Kastigar v. United States*, 406 U.S. 441, 444-45 (1972) (internal quotations omitted)). Southern District Judges Jesse M. Furman, Andrew L. Carter Jr. and Laura Taylor Swain each issued decisions within the past year discussing the threshold questions of who can invoke the privilege and under what circumstances.

Fear of Prosecution. Judge Furman's decision, in *SPV-LS, LLS v. Herbst*, 2016 WL 8711738 (S.D.N.Y. June 6, 2016), recounts the basic requirement that a party who refuses to provide evidence based on the Fifth Amendment "must have reasonable cause to apprehend that answering the question will provide the government with evidence to fuel a criminal prosecution" (id. at *1 (quoting *OSRecovery v. One Groupe Int'l*, 262 F. Supp. 2d 302, 306 (S.D.N.Y. 2003) (Kaplan, J.)), and that the danger must be real and not speculative. Id. (quoting *Estate of Fisher v. Comm'r of IRS*, 905 F.2d 645, 649 (2d. Cir. 1990) (internal citations omitted)). Judge Furman instructed that the magistrate judge who was to supervise the deposition in that case, should "scrutinize" each question and the defendant-witness's proffered explanations for assertion of the privilege, noting that innocuous questions that had no connection to a reasonable fear of prosecution should be answered.

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Applying these principles in *Hansen v. WWebnet*, 2017 WL 1032268 (S.D.N.Y. March 16, 2017), Judge Carter denied a motion to compel deposition testimony of a non-party witness brought by both parties to that action. Because the witness had previously pled guilty to the fraud at the center of the plaintiff's claims, both plaintiff and defendant objected to the witness's invocation of the Fifth Amendment, arguing that he could not reasonably fear future prosecution inasmuch as he already had been prosecuted for those activities.

EDWARD M. SPIRO *and* JUDITH L. MOGUL *are principals of Morvillo Abramowitz Grand Iason & Anello and co-authors of "Civil Practice in the Southern District of New York," 2d Ed. (Thomson Reuters 2016).*

After reviewing the transcript of the deposition at which the witness declined to answer questions based on the Fifth Amendment, Judge Carter accepted the witness's assertion that he continued to have a reasonable fear of prosecution despite his guilty plea, because he could still be prosecuted for tax evasion as well as for activities after the period covered by his prosecution. Judge Carter denied the motion to compel, concluding that the responses sought by the parties "could create a link in the chain of evidence needed to prosecute" the witness and thus fell squarely within the parameters of the Fifth Amendment. Id. at *3 (quoting *Sharma v. New Opal*, 2005 WL 1086459 (S.D.N.Y. May 6, 2005) (Katz, M.J.)).

Evidence Must Be Testimonial. Another important limitation is that the Fifth Amendment does not offer a shield against production of physical, as distinct from testimonial, evidence, unless the "act of production" itself can be considered testimonial in nature.

Judge Furman in *SPV-LS* and Judge Swain in *In re Cinque Terre Financial Group*, 2016 WL 6952349 (S.D.N.Y. Nov. 28, 2016), each considered how the "act of production" doctrine applies when invoked by a current or former corporate employee who may remain in possession of corporate documents. In *SPV-LS*, Judge Furman noted that because the defendant's past relationship with the corporate entity in question was a central issue in the litigation, his act of producing documents might trigger the act of production privilege, even if the contents of the documents were not privileged, if the act of production was (1) compelled, (2) testimonial, and (3) incriminating. 2016 WL 8711738, at *2 (citing *In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999*, 191 F.3d 173, 181 (2d Cir. 1999)). He cited *SEC v. Forster*, 147 F. Supp. 3d 223 (S.D.N.Y. Dec. 5, 2015) (Koeltl, J.), for the proposition that the Fifth Amendment was implicated where a defendant, through production of documents, was essentially required to state what documents exist, are in his possession and are authentic. Judge Furman stressed that the act of production privilege would only be available to the defendant if he was no longer affiliated with the entity in question. He noted that corporations may not assert the Fifth Amendment, and that under the Supreme Court's decision in *Braswell v. United States*, 487 U.S. 99 (1988), a corporate custodian of records may not assert the act of production doctrine to resist a subpoena. Accordingly, although no evidence was before the court that the defendant remained affiliated with the corporate entity, Judge Furman invited the plaintiffs to provide such evidence, which would preclude the defendant's assertion of the privilege.

Judge Swain's decision in *Cinque Terre* also addressed the difference between a current and former employee's ability to invoke the act of production privilege, focusing on the narrow question of whether the privilege is available to someone who was a corporate employee when he received a subpoena, but thereafter resigns from his employment. The individual who received the subpoena in *Cinque Terre*—Richard Rothenberg—had been the CFO of Cinque Terre Financial Group (CTFG) prior to CTFG being placed in liquidation in the British Virgin Islands. CTFG's liquidator served a preservation order and subpoena on Rothenberg, requiring him to produce documents in his possession, custody and control relating to CTFG. Rothenberg moved in the Bankruptcy Court to quash the subpoena based on his Fifth Amendment privilege against self-incrimination, asserting that he was no longer an employee of CTFG when the subpoena was served. When, in response, the liquidator argued that Rothenberg remained CTFG's CFO, Rothenberg sent him an email stating that he believed he had already been terminated as CFO, but that if that was not the case, he was tendering his resignation. The Bankruptcy Court found that Rothenberg was still an employee when he received the subpoena, and ordered that he comply, thereafter finding him in contempt when he failed to do so. Although the Bankruptcy Court noted the fact of the resignation email, it held that the original date on which the subpoena was served was the only operative date for determining Rothenberg's custodial status.

On appeal to the district court, Judge Swain found that the Bankruptcy Court's failure to consider the impact of Rothenberg's putative resignation on his obligation to produce documents after that point was reversible error. She relied on the Second Circuit's decision in *In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999*, 191 F.3d at 181, which held that former employees may claim the act of production privilege for corporate documents that remain in their possession after their employment ends. Because the Bankruptcy Court only considered Rothenberg's employment status as of the time the subpoena was served, but not as of the time the Court issued its order that Rothenberg produce the documents, Judge Swain reversed and remanded

to the Bankruptcy Court for a determination of whether Rothenberg held any documents in his representative capacity at the time the court ordered that he comply with the subpoena.

Consequences

Although the Fifth Amendment offers broad protection to witnesses and parties in civil litigation, invocation of the privilege may come at a high cost because it permits the finder of fact to draw an adverse inference from the assertion of the Fifth Amendment. See *Baxter v. Palmagiano*, 425 U.S. 308, 318 (1976); *Brink's v. New York*, 717 F.2d 700, 709 (1983); see also *Hansen v. WWebnet*, 2017 WL 1032268 (noting that the plaintiff, as the party denied discovery by the witness's invocation of the Fifth Amendment, can ask the court for an adverse inference instruction). Judge Katherine B. Forrest issued a decision in *In re 650 Fifth Avenue and Related Properties*, 2017 WL 2214869 (S.D.N.Y. May 18, 2017), in which the corporate claimant (and related individuals) in that civil forfeiture proceeding attempted to avoid such an adverse inference by (1) offering to have two former members of the claimant's board of directors retract their earlier invocation of the Fifth Amendment and appear for deposition; and (2) seeking an order preventing the government from introducing the fact that various of the corporate claimant's employees, directors and agents had invoked the Fifth Amendment in connection with their depositions.

Judge Forrest rejected both requests. She refused to allow the witnesses to withdraw their earlier invocation of the Fifth Amendment and appear for deposition on the eve of trial. She accepted the government's argument that it would be prejudiced by reopening discovery at that late date, observing that the parties have the right to rely on the record developed during discovery, and that the government had done so, having submitted the pre-trial order, marked exhibits and designated deposition testimony. She concluded that to permit substantive testimony from the two witnesses in question would provide claimant with an unfair advantage and allow it to use the privilege impermissibly as both a sword and a shield.

As these cases demonstrate, a witness seeking to invoke the Fifth Amendment in civil proceedings may not always have that option, and those who do successfully invoke the privilege, or are closely aligned with witnesses who do, may bear substantial consequences in the civil arena.

Judge Forrest went on to consider whether the government should be permitted to introduce the fact that several of its former officers and directors asserted the Fifth Amendment. Rejecting as unsubstantiated the claimant's argument that the government had improperly left its criminal investigation open in order to coerce the witnesses into taking the Fifth, she found that the fact that these witnesses asserted the Fifth Amendment was relevant under Federal Rule of Evidence 401 and that its probative value was not outweighed by the danger of unfair prejudice under Rule 403. Citing *Brink's v. New York*, 717 F.2d 700, Judge Forrest acknowledged that permitting the jury to draw an inference that the witnesses' testimony would have been inculpatory was undoubtedly helpful to the government's case, but that there is a difference between prejudice related to support for the government's position, and prejudice from evidence that is "otherwise inflammatory." She held that only the latter warrants preclusion under Rule 403. Finally, Judge Forrest determined that the government would be permitted either to call the witnesses at trial and have the jury observe them taking the Fifth (having already ruled that they could not retract their invocation of the privilege), or play their videotaped depositions, in order to permit the jury to assess the witnesses' demeanor in deciding whether or not to draw a negative inference.

Conclusion

As these cases demonstrate, a witness seeking to invoke the Fifth Amendment in civil proceedings may not always have that option, and those who do successfully invoke the privilege, or are closely aligned with witnesses who do, may bear substantial consequences in the civil arena.