

Southern District Civil Practice Roundup

Expert Analysis

Challenges in Successfully Asserting The Fifth Amendment

Sorting through when, how and the extent to which a deponent in civil litigation may invoke the Fifth Amendment privilege against self-incrimination to avoid answering questions at a deposition presents both substantive and procedural questions. In his recent decision in *Securities and Exchange Commission (SEC) v. Pence*, No. 15-cv-7077 (GBD) (GWG), 2017 WL 49977792 (S.D.N.Y. Oct. 31, 2017), Southern District Magistrate Judge Gabriel W. Gorenstein considered both the timing and scope of a non-party deponent's assertion of his Fifth Amendment rights. The court's particularized analysis of the Fifth Amendment in the specific context presented, as well as its procedural considerations, provide useful guidance for counsel whose clients seek to invoke or limit the invocation of the privilege in civil litigation.

'SEC v. Pence'

In *Pence*, the SEC charged Pence with engaging in a scheme to defraud

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General Employment Enterprises (GEE) and its investors. Pence had been the nominal owner of GEE, although the SEC alleged that he actually owned the company on behalf of another individual who was a con-

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victed felon, as a means to circumvent various barriers to that individual's operations of a business entity in his own name. The SEC alleged that Pence had made misrepresentations

to GEE's outside auditors and in certain securities filings, and had signed a Form 10-K containing false statements about a \$2.3 million withdrawal from GEE's accounts. Both the SEC and Pence sought to depose a witness, Gregory Bartko, who, according to Pence, had both served as an attorney for GEE and another entity involved in the alleged fraud, and also had specifically advised Pence regarding the disclosures at issue. Pence also maintain that Bartko had helped him investigate the "disappearance" of the \$2.3 million from GEE's account.

At the time Pence sought Bartko's deposition, Bartko was in prison on a prior, apparently unrelated conviction that he had vigorously challenged through a series of unsuccessful post-trial motions and on appeal, and was continuing to challenge through a still-pending habeas corpus petition. Because Bartko was incarcerated, Pence was required to seek a judicial order permitting the deposition. Judge Gorenstein granted that order, after soliciting and receiving from Bartko an initial indication that Bartko did not object to being deposed, but reserved his right to

assert the attorney-client privilege and “any other relevant evidentiary privileges.” Bartko subsequently submitted a letter to the court stating that he would not submit to “any testimonial deposition ... until [his] Habeas Petition [was] fully litigated.” 2017 WL 49977792, at *4.

Following receipt of this letter, Judge Gorenstein instructed the parties, Bartko and Bartko’s habeas attorney to list potential areas of questioning so that Bartko could set forth his legal arguments for any refusal to answer any questions on these topics. Pursuant to this directive, the SEC and Pence identified topics relating to Bartko’s prior criminal conviction, in addition to Bartko’s dealings with Pence, GEE, and related entities. The SEC also indicated that it wished to question Bartko on “his lawsuits against, and views towards, federal agents or agencies, including the SEC.” Bartko responded that he would refuse to answer questions on each proposed topic based on his Fifth Amendment privilege, and would only respond to questions in a few general areas such as biographical information, his relationship with the Pence, and the identity of other clients named in the SEC complaint.

Timing of Fifth Amendment Determination

Judge Gorenstein observed that the typical procedure when a deponent asserts the Fifth Amendment privilege “is for the deponent to attend the deposition, to be sworn under oath, and to answer those questions he can without risking self-incrimination.” 2017 WL 49977792, at *5. Under this approach, the deposing party may

subsequently (or contemporaneously) move to compel answers to any questions as to which it maintains the witness has improperly asserted privilege. Thus, ordinarily, litigation over a witness’s claimed Fifth Amendment rights occurs only after the questions have been put to the witness. Judge Gorenstein noted that in some cases, however, courts have resolved challenges to the application of the privilege in advance of a deposition, an approach he found appropriate in this case, in light of the fact that Bartko

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was incarcerated, proceeding pro se, and that all the parties had invited him to do so. *Id.* at *5.

Fifth Amendment Analysis

Judge Gorenstein discussed the longstanding basic parameters governing invocation of the Fifth Amendment privilege, noting the Supreme Court’s more than fifty-year-old holding in *Hoffman v. United States*, 341 U.S. 479 (1951), that the privilege against self-incrimination protects both “answers that would themselves support a conviction under a federal criminal statute,” as well as answers that “would furnish a link in the chain of evidence needed to prosecute” the witness. He explained that to invoke the privilege, “it need only

be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.” 2017 WL 49977792, at *5 (quoting *Hoffman*, 341 U.S. at 486-87). He observed that the Second Circuit has further clarified that the relevant inquiry is not the “practical possibility that prosecution would result,” but instead whether there is a “slight possibility of prosecution.” *Id.* at *5 (quoting *United States v. Miranti*, 253 F.2d 135, 139 (2d. Cir. 1958)).

Judge Gorenstein then turned to the specifics of Bartko’s privilege assertion. Stressing the need to “undertake a particularized inquiry to determine whether the [defendant’s assertion of Fifth Amendment rights] was founded on a reasonable fear of prosecution,” *id.* at *6, he rejected Bartko’s blanket announcement that he would invoke the privilege in response to all questions except for a narrow list of biographical and factual inquiries. However, perhaps because Bartko was unrepresented, Judge Gorenstein undertook his own inquiry to determine if Bartko had a legitimate basis to invoke his Fifth Amendment rights for each of the specific proposed topics of questioning.

Judge Gorenstein first examined whether Bartko could invoke the privilege with respect to questions concerning Bartko’s prior conviction. The key issue here was whether Bartko could invoke the privilege to avoid answering questions about a crime for which he had already been convicted, sentenced and lost his direct appeal.

Judge Gorenstein noted that under established precedent, the privilege applies until “the sentence has been fixed and the judgment of conviction has become final.” A conviction is not final for purposes of determining whether a witness has a reasonable fear of incrimination, so long as an appeal is pending, because the witness “remains in jeopardy insofar as any testimony he offers in these proceedings could potentially prejudice him either in connection with his appeal or at a possible retrial.” *Id.* at *6.

Recognizing that no case law directly addresses the significance of a pending habeas petition to this analysis, Judge Gorenstein concluded that “given the important interests at stake,” the “pendency of a timely-filed undecided motion under 28 U.S.C. §2255 is sufficient for [the court to find] that it is not ‘remote and speculative’ that Bartko’s conviction could be overturned.” *Id.* at *6. Bartko had argued that his deposition testimony might affect his pending habeas petition, should the court hold an evidentiary hearing. Judge Gorenstein noted additionally that, even though Bartko did not mention it, a new trial could be granted if the judgment of conviction were vacated, and that the government could then use his deposition testimony against him as evidence in the new trial. *Id.* at *2. Judge Gorenstein concluded that Bartko had reasonable cause to apprehend that testifying at the deposition might incriminate him, and authorized Bartko to assert his Fifth Amendment privilege to refrain from answering questions related

to the conduct that led to his prior conviction.

Judge Gorenstein separately analyzed whether Bartko could assert the privilege to avoid answering questions about the scheme alleged by the SEC against Pence in the proceeding for which the deposition was sought. Bartko argued that since he had represented “one or more of the alleged co-conspirators,” his deposition testimony might subject him to new charges related to the scheme alleged against Pence. Judge Gorenstein held that Bartko easily met the relatively low bar of showing “a possibility of incrimination,” given that attorneys from Bartko’s firm provided advice to Pence about the \$2.3 million issue. *Id.* at *8. Additionally, the court recognized that the government would seek to use Bartko’s testimony to establish his involvement in preparing documents that the SEC alleged contained misrepresentations.

As part of his detailed inquiry into each potentially topic of questioning, Judge Gorenstein also defined the limits of Bartko’s invocation of the privilege, identifying topics or questions that would not be subject to Fifth Amendment protections. For example, although Bartko’s right against self-incrimination applied to questions about the facts of Bartko’s underlying conviction, the court noted that questions regarding his status as a prisoner or as a convicted felon, and statements he made at his trial or sentencing, while arguably related to his conviction, did not actually implicate his Fifth Amendment rights. Similarly, although Bartko could invoke his privilege with respect to questions

about the facts underlying the scheme alleged against Pence, Judge Gorenstein ruled that the SEC would still be allowed to question Bartko on general topics about government investigations, such as his views of the SEC and other government agencies.

Conclusion

Judge Gorenstein engaged in this somewhat unusual, topic-by-topic pre-deposition determination of lines of questioning as to which the witness would be permitted to invoke the Fifth Amendment, and those into which the parties would be permitted to inquire, in large measure because the witness in this case was a pro se prisoner. But this pre-deposition approach to resolving potential privilege claims is not necessarily limited to cases involving prisoner depositions and may, in the right case, provide an effective and efficient avenue to resolving privilege issues that can reasonably be anticipated in advance. Counsel seeking early privilege determinations should be prepared to make a detailed showing of the particularized Fifth Amendment concerns implicated by the anticipated lines of questioning.