

THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF INCRIMINATION IN BANKRUPTCY LITIGATION

The Fifth Amendment to the United States Constitution provides, in pertinent part, that “[n]o person shall be ... compelled in any criminal case to be a witness against himself.” Despite the amendment’s reference to any “criminal” case, the privilege against self-incrimination (the “privilege”) “applies in any type of proceeding whether civil, criminal, administrative, investigatory, or adjudicatory.”¹ Therefore, a bankruptcy practitioner might face privilege issues in an adversary proceeding, contested matter, or other bankruptcy proceeding. This article first addresses general privilege issues – e.g., who is entitled to claim the privilege, and can it be waived? – and then examines bankruptcy case law concerning the consequences of claiming the privilege in litigation.²

I. Who is entitled to assert the privilege?

Only individuals are entitled to assert the privilege. The United States Supreme Court has ruled that neither corporations nor other artificial or “collective” entities (e.g., partnerships, labor unions) are protected by the privilege.³ The rule that corporations and other collective entities are not protected by the privilege is known as the “collective entity” rule.

Accordingly, a corporate officer cannot refuse to testify on the ground that his testimony might incriminate the corporation.⁴ However, a corporate officer “cannot lawfully be compelled, in the absence of a grant of adequate immunity from prosecution, to condemn himself by his own oral testimony.”⁵

Another consequence of the collective entity rule is that a collective entity cannot refuse to produce its records on the basis of the privilege.⁶ Even if the corporation ceases to exist under state law, the privilege does not protect against production of its records.⁷

In In re Grand Jury 89-4 Subpoena Duces Tecum, 727 F.Supp. 265, 268 (1989), the District Court suggested that a corporate employee may be able to refuse to produce corporate documents if the act of producing them might prove personally incriminating. The District Court stated that “act-of-production” analysis involves a “two step inquiry: (1) would a jury, told that the Corporation produced the documents, nonetheless inevitably conclude that it was ... [the employee] who had possession of the documents and produced them, and, if so (2) would this give rise to any incriminating inferences concerning a document’s (i) existence, (ii) authenticity, or (iii) its custody.”⁸

However, the suggestion in Grand Jury 89-4 that there might be an act-of-production exception for corporate employees is clearly in conflict with the Fourth Circuit’s subsequent ruling in United States v. Stone, 976 F.2d 909, 912 (4th Cir. 1992), that a person’s “status as the sole shareholder, director, officer, and employee” of a corporation “did not excuse him from the duty of producing ... corporate documents that he held in his representative capacity.” Therefore, it is clear that there is no act-of-

production exception to the collective entity rule that would protect a corporate employee from producing corporate documents.

An issue that hasn't been addressed by either the Fourth Circuit or the federal district courts in Virginia is whether an act-of-production exception is available to a former corporate employee who is no longer acting as a corporate representative. If such an exception were available, then a corporate employee could frustrate a document subpoena by simply quitting his job and taking documents with him. Despite the potential for abuse, some courts have ruled that a former employee who is no longer acting as a corporate representative can refuse to produce documents based on an act-of-production exception.⁹

II. What does the privilege protect against?

“[T]he Fifth Amendment protects the person asserting the privilege only from *compelled* self incrimination.”¹⁰ The compulsion protected against by the privilege is “‘physical or moral compulsion’ exerted on the person asserting the privilege.”¹¹ Hence, the privilege “does not protect against incriminating statements elicited from other parties.”¹²

As for the meaning of “incrimination,” it covers not only information “which may directly support a criminal conviction, but ... ‘information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution.’”¹³

The privilege clearly protects an individual against being compelled to provide oral testimony that might incriminate him or her.¹⁴ A separate issue is whether an individual can be compelled to provide documents or things that might incriminate him or her. The Supreme Court has made clear that an individual cannot claim the privilege based upon incrimination that might result because of the contents of a document.¹⁵ As stated by the Supreme Court in the Bouknight case, “[w]hen the government demands that an item be produced, the ‘the only thing compelled is the act of production.’”¹⁶ Therefore, while the contents of a document do not provide the basis for a valid claim of the privilege, a valid claim of the privilege can be made where the act of producing a document or thing has incriminating testimonial aspects of its own. An act of production has incriminating testimonial aspects if the act “testifies to the existence, possession, or authenticity of the things produced.”¹⁷

Nonetheless, even if the act of producing a document or thing has one or more testimonial aspects, the privilege will not prevent the production of the document or thing if that testimonial aspect is a “foregone conclusion.” For example, in United States v. Stone, 976 F.2d 909, 911-12 (4th Cir. 1992), the Fourth Circuit held that the existence, possession, and authenticity of various bills related to a home were a foregone conclusion and, therefore, could not be withheld from production on act-of-production grounds. The Court noted that the existence and possession of the bills by the individual was not

disputed and that even if the production of the bills would authenticate them, the authentication was a foregone conclusion because the government could easily obtain the bills from the utility companies.¹⁸

III. How is the privilege properly asserted?

“A party wishing in good faith to assert the privilege must do so ‘with respect to particular [allegations], thereby allowing the trial judge to determine the propriety of each refusal. The privilege may also be asserted and preserved in the course of discovery proceedings, Fed.R.Civ.P. 26 (c), but in specifics sufficient to provide the court with a record upon which to decide whether the privilege has been properly asserted as to each question.” North River Insurance Company, Inc. v. Stefanou, 831 F.2d 484, 487 (4th Cir. 1987) (citations omitted) (emphasis added). In North River, the Fourth Circuit affirmed the District Court’s entry of judgment on the pleadings against a defendant who issued a blanket claim of the privilege in response to the complaint, as well as the plaintiff’s requests for admissions. The court noted that “the mere ‘blanket refusal to answer questions does not suffice to raise constitutional issues.’”¹⁹

In cases where a properly asserted privilege is challenged, the court must determine whether there is “a sufficient hazard of incrimination” to uphold the assertion of the privilege.²⁰ To make this determination, the court must resolve two issues: whether the information being sought is incriminating in nature; and if so, “whether criminal prosecution is sufficiently a possibility, all things considered, to trigger the need for constitutional protection.”²¹ With respect to the first step, information is incriminating in nature if, as noted above, it directly supports a criminal conviction, or would furnish a link in the chain of evidence that could lead to prosecution, or an individual reasonably believes it could be used against him in a criminal prosecution.

As for the second step, the court must assess “the objective reasonableness of the ... [individual’s] claimed apprehension of prosecution.”²² “[T]he reasonableness of a claimed apprehension should simply be assumed once incriminating potential is found, unless there are genuine questions about the government’s legal ability to prosecute,” such as “statutes of limitation, double jeopardy, or immunity.”²³

IV. Can the privilege be waived?

The privilege can be waived. To start, an individual who wishes to have the protection of the privilege must affirmatively invoke the privilege, “and the failure to do so forecloses him from invoking the privilege.”²⁴ Further, if an individual voluntarily reveals incriminating facts, the privilege “may not then be invoked to avoid disclosure of the details.”²⁵ In Mitchell v. United States, 526 U.S. 314, 321, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999), the Supreme Court stated that “[t]he privilege is waived for the matters to which the witness testifies, and the scope of the ‘waiver is determined by the scope of relevant cross-examination.’” (quoting Brown v. United States, 356 U.S. 148, 154-155, 78 S.Ct. 622, 2 L.Ed.2d 589 (1958)). Nonetheless, a witness can refuse to

answer a question regarding the details of an incriminating fact he has already revealed if answering “would subject him to a ‘real danger’ of further incrimination.”²⁶

In Klein v. Harris, 667 F.2d 274, 287 (2d Cir. 1981), the Second Circuit adopted a test for determining whether a litigant has waived the privilege. Under this test, a waiver should be inferred only if, “(1) the witness’ prior statements have created a significant likelihood that the finder of fact will be left with and prone to rely on a distorted view of the truth, and (2) the witness had reason to know that his prior statements would be interpreted as a waiver of the fifth amendment’s privilege against self-incrimination.” The Klein test has been characterized as “the most widely accepted test for determining whether an individual has waived the Fifth Amendment privilege against self-incrimination.”²⁷

If an individual has waived the privilege in one trial or proceeding, he is not estopped to assert it as to the same matter in a future trial or proceeding.²⁸ In the context of a bankruptcy case, this leads to the question of whether the bankruptcy case should be considered a single “trial or proceeding” such that a waiver of the privilege by the debtor that takes place in one part of the case (e.g., at the § 341 meeting) estops the debtor from asserting the privilege in another part of the case (e.g., in a contested matter or adversary proceeding). There is no case law binding in Virginia on this question. In In re Gi Yeong Nam, 245 B.R. 216, 233 (Bankr.E.D.Pa. 2000), the bankruptcy court provides a lengthy analysis of this question. The bankruptcy court concluded that a debtor’s waiver of the privilege at the § 341 meeting estops the debtor from claiming the privilege as to the same matter in an adversary proceeding because the adversary proceeding – a trustee’s action to recover a fraudulent conveyance – was “causally related to the very purpose of the § 341 meeting which is to elicit information that allows a trustee to discover improper transfers and recover assets for the estate.” The bankruptcy court suggested that it would have ruled differently if the causal relationship between the § 341 meeting and the adversary proceeding was not as strong, such as an adversary proceeding based on “a state law action for intentional interference with contract relations.”²⁹

V. What are the consequences of claiming the privilege to a civil litigant?

The consequences of claiming the privilege to a civil litigant have not been exactly defined, although they are the subject of many reported cases. As stated in In re Grant, 237 B.R. 97, 110 (Bankr.E.D.Va. 1999), “[w]hile courts have often observed that ‘attempts ... to make the assertion of the Fifth Amendment privilege ‘costly,’ as the result of the invocation alone ...’ are inappropriate (citation omitted), many have likewise expounded that an invocation of the Fifth Amendment by a civil litigant is not necessarily a cost free exercise.” Nonetheless, reported bankruptcy cases provide some outline as to the consequences of invoking the privilege.

- a. Claiming the privilege does not automatically lead to an adverse finding or ruling against the party who makes the claim.

First, a debtor's invocation of the privilege does not automatically lead to a ruling against the debtor on the issue to which his invocation of the privilege relates. For example, In re Curtis, 177 B.R. 717 (Bankr.S.D.Ala. 1995), involved a bank seeking to have its debt declared non-dischargeable as having been created through the debtor's false pretenses and false representations. The bank, however, failed to put on any evidence that the debtor had made a false representation.³⁰ The bankruptcy court noted that "[t]he issue is the weight of the adverse inference to be drawn, if any, from debtor's reliance on his Fifth Amendment privilege against self-incrimination."³¹ The bankruptcy court then stated as follows:

"A plaintiff seeking to rely on a Fifth Amendment inference must first offer evidence which at least tends to prove each part of the plaintiff's case. Once that has been done, the Court can then add to the weight of the other evidence by use of the inference. However, the invocation of the Fifth Amendment privilege, standing alone, is not sufficient evidence to constitute probative proof of a plaintiff's case. If the plaintiff offers no evidence of fraud ... the inference from the invocation of the Fifth Amendment does not by itself establish fraud."³²

Accordingly, the court rejected the bank's case despite the debtor's assertion of his Fifth Amendment privilege.³³ Similarly, in the Grant case, which involved a nondischargeability claim based on alleged false pretenses, false representations, and fraud, the bankruptcy court rejected the creditors' assertion that they had proved a misrepresentation by the debtor through the debtor's invocation of the privilege in response to a certain question.³⁴ The bankruptcy court stated that "[t]he recognition of the necessity to introduce probative evidence conversely dooms the efforts of the plaintiffs to use the invocation of the Fifth Amendment by ... [the debtor] to establish proof of facts where no evidence was introduced or admitted."³⁵

Likewise, a debtor cannot rely on the privilege in place of evidence needed to satisfy a burden he carries in litigation. For example, in In re Wazeter, 209 B.R. 222, 224 (W.D.Mich. 1997), the creditor objected to the debtor's receiving a chapter 7 discharge based on the debtor's failure to keep financial records. The debtor had the burden of proving that his failure to keep records was justified under the circumstances.³⁶ The bankruptcy court concluded that "invocation of . . . [the privilege] could not relieve the debtor of his burden to prove justification," and the district court affirmed this reasoning.³⁷

Further, as stated in In re Hanson, 225 B.R. 366, 371 (Bankr.W.D.Mich. 1998), "[o]nce a debtor invokes his right against self-incrimination concerning matters uniquely within his own knowledge, the court is allowed to shift to the defendant the burden of going forward with evidence to rebut a plaintiff's claim." (citation omitted) The bankruptcy court went on to state that "[b]ecause Hanson refused to testify concerning documentary and other evidence uniquely within his knowledge, it was his burden to show that certain evidence submitted by C&G was untrustworthy."³⁸

- b. Claiming the privilege can result in the bankruptcy court drawing a negative inference against the party who makes the claim.

As stated in the Curtis case, a court may draw a negative inference from a litigant's invocation of the privilege in response to a question so long as the opposing party has offered evidence which tends to prove the related part of the plaintiff's case.³⁹ The negative inference is that "a truthful and forthright answer to the question would have been adverse to the witness' interests."⁴⁰

- c. The debtor cannot use the privilege as a surprise tactic.

A debtor is not allowed to use the privilege as a surprise tactic in litigation. For example, in Hanson, the debtor invoked the privilege throughout a pre-bankruptcy lawsuit, a Rule 2004 examination, and during discovery in the adversary proceeding, but then waived the privilege at trial.⁴¹ The bankruptcy court wrote that "[a] defendant may not use the Fifth Amendment to shield [him]self from the opposition's inquiries during discovery only to impale [his] accusers with surprise testimony at trial."⁴² To allow this tactic, the court said, would "have allowed . . . [the debtor] to first impale his accusers and then twist the knife."⁴³

The case of In re Edmond, 934 F.2d 1304, 1308 (4th Cir. 1991), is also on point in this regard. In Edmond, the debtor invoked the privilege during discovery in the creditor's nondischargeability action, but then moved for summary judgment based on his own affidavit.⁴⁴ The Fourth Circuit denied the summary judgment motion, stating that "by selectively asserting the Fifth Amendment privilege, Edmond attempted to ensure that his unquestioned, unverified affidavit would be the only version. But the Fifth Amendment privilege cannot be invoked as a shield to oppose depositions while discarding it for the limited purpose of making statements to support a summary judgment motion."⁴⁵ The court also stated that "[t]he cases demonstrate that the Fifth Amendment is 'not a positive invitation to mutilate the truth a party offers to tell.'"⁴⁶ Indeed, in one of the cases the Fourth Circuit was referring to in Edmond, Lawson v. Murray, 837 F.2d 653 (4th Cir.), the court sustained a trial court's striking of a witness' testimony on direct examination in a criminal trial because the witness invoked the privilege to avoid answering cross-examination questions.

VI. Conclusion

As the case law demonstrates, the precise consequences of claiming the privilege in a bankruptcy proceeding are not entirely obvious. It does appear clear, however, that a plaintiff must offer proof to support the basic elements of his case even in the face of the privilege. Once evidence supporting the basic case is set forth, the court may use the defendant's claiming of the privilege to draw a negative inference. It will of course be up to the fact finder to determine precisely how much evidence needs to be established and how strong a negative inference to draw. It also appears clear that once the privilege is

asserted, it cannot be waived as a surprise tactic. Thus, in a civil proceeding where the stakes are large and where the possibility of criminal prosecution appears remote, great care should be taken before the privilege is asserted since it will almost certainly hurt the debtor/defendant's defense and cannot be reversed midway through the civil proceeding.

The bankruptcy debtor/defendant who is contemplating asserting the privilege must balance his or her desire to avoid potential criminal prosecution against his or her desire to prevail in the bankruptcy litigation. For the bankruptcy practitioner representing the debtor/defendant in this situation, the best course of action would be to associate criminal counsel to advise the debtor/defendant regarding the likely impact of testifying freely on a criminal case. In situations where criminal counsel cannot be associated, counsel should clearly and thoroughly disclose to the debtor/defendant the possible potential consequences of both claiming and waiving the privilege so that the debtor/defendant can make an informed and sensible decision.

¹ United States v. Sharp, 920 F.2d 1167, 1170 (4th Cir. 1990) (citation omitted).

² This article does not address issues related to grants of immunity from criminal liability that make assertion of the privilege unnecessary. Note, however, that Bankruptcy Code § 344 provides that “[i]mmunity for persons required to submit to examination, to testify, or to provide information in a case under this title may be granted under part V of title 18.”

³ See, e.g., Hale v. Henkel, 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652 (1906) (involving a corporation); United States v. White, 322 U.S. 694, 64 S.Ct. 1248, 88 L.Ed. 1542 (1944) (involving a labor union); Bellis v. United States, 417 U.S. 85, 94 S.Ct. 2179, 40 L.Ed.2d 678 (1974) (involving a partnership).

⁴ Curcio v. United States, 354 U.S. 118, 122, 77 S.Ct. 1145, 1 L.Ed.2d 1225 (1957).

⁵ Id. at 124 (emphasis on “himself” added; emphasis on “oral testimony” in original).

⁶ Braswell v. United States, 487 U.S. 99, 108 S.Ct. 2284, 101 L.Ed.2d 98 (1988).

⁷ In re Grand Jury 89-4 Subpoena Duces Tecum, 727 F.Supp. 265 (1989) (“In short, corporate documents cannot be immunized from a proper subpoena by the ploy of dissolving or ending the corporation; the documents are not thereby transformed into personal documents.”).

⁸ Id. at 270.

⁹ See In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999, 191 F.3d 173 (2^d Cir. 1999) (former employee can refuse to produce documents); In re Grand Jury Proceedings, 71 F.3d 723 (9th Cir. 1995) (former employee can refuse to produce documents); contra In re Grand Jury Subpoena Dated November 12, 1991, 957 F.2d 807 (11th Cir. 1992) (former employee can not refuse to produce documents).

¹⁰ United States v. Doe, 465 U.S. 605, 610, 104 S.Ct. 1237, 79 L.Ed.2d 552 (1984) (italics in original) (citation omitted).

¹¹ Fisher v. United States, 425 U.S. 391, 397, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976) (citations omitted).

¹² Streett v. United States, 65 F.Supp.2d 383, 385 (W.D.Va. 1999).

¹³ United States v. Sharp, 920 F.2d 1167, 1170 (4th Cir. 1990) (citations omitted).

¹⁴ See Curcio v. United States, 354 U.S. 118, 77 S.Ct. 1145, 1 L.Ed.2d 1225 (1957).

¹⁵ Baltimore City Dept. of Social Services v. Bouknight, 493 U.S. 549, 555, 110 S.Ct. 900, 107 L.Ed.2d 992 (1990) (“a person may not claim the Amendment’s protections based upon the incrimination that may result from the contents or nature of the thing demanded.”); see also United States v. Wujkowski, 929 F.2d 981, 983 (“The case law now makes plain that appellants’ claim of privilege broadly based on the contents of appointment books and beach house records must be rejected.”) (citations omitted).

¹⁶ 493 U.S. at 554-55 (quoting Fisher, 425 U.S. at 410 n.11.).

¹⁷ Id. at 555.

¹⁸ 976 F.2d at 911-12.

¹⁹ Id. at 486 (quoting United States v. Carroll, 567 F.2d 955, 957 (10th Cir. 1977).).

²⁰ United States v. Sharp, 920 F.2d 1167, 1170 (4th Cir. 1990) (citing Hoffman v. United States, 341 U.S. 479, 486, 71 S.Ct. 814, 95 L.Ed. 1118 (1951).).

²¹ Id. at 1171.

²² Id.

²³ Id.; but see In re Grand Jury Subpoena to John Doe, 41 F.Supp.2d 616, 623-24 (W.D.Va. 1999) (adding that “the privilege will not be upheld ‘where prosecution would be a mere imaginary possibility, remote and improbable.’”) (quoting United States v. Goodman, 289 F.2d 256, 259 (4th Cir. 1961), and Belmonte v. Lawson, 750 F.Supp. 735 (E.D.Va. 1990) (stating that “[w]here, as here, ‘a 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.’” (quoting In re Folding Carton Antitrust Litigation, 609 F.2d 867, 871 (7th Cir. 1979)).

²⁴ United States v. Penrod, 609 F.2d 1092, 1095 (4th Cir. 1979); see also In re Blan, 239 B.R. 385, 393 (Bankr.W.D.Ark. 1999) (“The Fifth Amendment privilege against self-incrimination is waived (or lost) if it is not invoked.”).

²⁵ Environmental Defense Fund, Inc. v. Lamphier, 714 F.2d 331, 339 (4th Cir. 1983).

²⁶ In re Gi Yeong Nam, 245 B.R. 216, 227 (Bankr.E.D.Pa. 2000) (quoting Rogers v. United States, 340 U.S. 367, 373-74, 71 S.Ct. 438, 95 L.Ed. 344 (1951)).

²⁷ In re Blan, 239 B.R. at 394.

²⁸ In re Neff, 206 F.2d 149, 152 (3rd Cir. 1953).

²⁹ Id. at 232.

³⁰ Id. at 720.

³¹ Id. at 719.

³² Id. at 720.

³³ Id.

³⁴ 237 B.R. at 111-12 n.25.

³⁵ Id. at 111. See also In re Caucus, 106 B.R. 890, 921 (Bankr.E.D.Va. 1989) (involving litigation related to an involuntary petition) (“Prior to a court’s drawing of an adverse inference, however, there must be sufficient independent evidence of the assertion in addition to the mere invocation of the privilege.” (quoting Baxter v. Palmigiano, 425 U.S. 308, 318 (1976).); and In re Caucus, 83 B.R. 921, 926 (Bankr.E.D.Va. 1988) (Bankruptcy Court declines to consider negative inferences at summary judgment stage unless movant can meet its burden under Federal Rule of Civil Procedure 56 without such inferences).

³⁶ Id. at 227.

³⁷ Id. at 231-32. (See also Detrick v. Panalpina, Inc., 108 F.3d 529, 544 (4th Cir. 1997) (counterclaimant failed to prove breach of contract cause of action for summary judgment purposes because counterclaimant’s employees invoked the privilege instead of submitting testimony that would establish the admissibility of certain invoices central to the cause of action).)

³⁸ Id.

³⁹ See also In re Grant, 237 B.R. at 111-12 (finding that Bankruptcy Court may draw negative inference); and In re Caucus, 106 B.R. at 921 (“this court recognizes that the Fifth Amendment does not forbid the drawing of ‘adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them[.]’”) (citations omitted).

⁴⁰ 3 Collier on Bankruptcy, ¶ 344.04 [3], 344-20 (2002) (citations omitted).

⁴¹ 225 B.R. at 371.

⁴² Id.

⁴³ Id.

⁴⁴ Id. at 1306.

⁴⁵ Id. at 1308.

⁴⁶ Id. at 1308.