CHAPTER 13
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   “Health Care Fraud: What Every Doctor Should Know Before the Agents Are at Your Door,” University of Texas Southwestern Medical Center, March 1995
# TABLE OF CONTENTS

I. INTRODUCTION .......................................................................................................................... 1

II. AVAILABILITY OF FIFTH AMENDMENT PRIVILEGE .............................................................. 1

III. HOW DOES A WITNESS INVOKE HIS FIFTH AMENDMENT PRIVILEGE IN CIVIL PROCEEDINGS? .. 1

IV. MAY A NEGATIVE INERENCE BE DRAWN FROM THE INVOCATION OF FIFTH AMENDMENT PRIVILEGE IN CIVIL PROCEEDINGS? ........................................................................................................... 1

V. IF A NEGATIVE INERENCE MAY BE DRAWN WHAT ARE THE CONDITIONS PRECEDENT TO DRAWING SUCH AN INERENCE? ........................................................................................................... 2

VI. JURY INSTRUCTION ISSUES .................................................................................................... 2

VII. FIFTH AMENDMENT PRIVILEGE IN CIVIL FORFEITURE PROCEEDINGS .......................... 3

VIII. OTHER COSTS OF THE ASSERTION OF FIFTH AMENDMENT PRIVILEGE .......................... 4

IX. THE FIFTH AMENDMENT AND NON-PARTY WITNESS INVOCATION .................................. 4

X. RELIEF FROM DISCOVERY IN CIVIL CASES ......................................................................... 4
# TABLE OF AUTHORITIES

<table>
<thead>
<tr>
<th>Case</th>
<th>Citation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Baxter v. Palmigiano</td>
<td>425 U.S. 308</td>
</tr>
<tr>
<td>C3INC. v. United States,</td>
<td>5 Cl. Ct. 659, 661</td>
</tr>
<tr>
<td>CF Digital Equip’t v. Currie Entertainment,</td>
<td>142 F.R.D. 8</td>
</tr>
<tr>
<td>Carter v. Kentucky</td>
<td>450 U.S. 288</td>
</tr>
<tr>
<td>In Re Caucus Distributors, Inc.</td>
<td>83 B.R. 921</td>
</tr>
<tr>
<td>City of Chicago v. Reliable Truck Parts Company, Inc.</td>
<td>822 F. Supp. 1288</td>
</tr>
<tr>
<td>FDIC v. Fidelity &amp; Deposit Company of Maryland</td>
<td>45 F.3d 969</td>
</tr>
<tr>
<td>In re Grant</td>
<td>237 B.R. 97</td>
</tr>
<tr>
<td>Griffin v. California</td>
<td>380 U.S. 609</td>
</tr>
<tr>
<td>In Re Hunt</td>
<td>153 B.R. 445</td>
</tr>
<tr>
<td>In SEC v. Graystone Nash, Inc.</td>
<td>25 F.3d 187</td>
</tr>
<tr>
<td>Integrated Generics, Inc. v. Bowen</td>
<td>678 F. Supp. 1004</td>
</tr>
<tr>
<td>Klein v. Smith</td>
<td>559 F.2d 189</td>
</tr>
<tr>
<td>Lefkowicz v. Cunningham</td>
<td>431 U.S. 808</td>
</tr>
<tr>
<td>Pillsbury v. Convoy</td>
<td>459 U.S. 248</td>
</tr>
<tr>
<td>SEC v. Chestman</td>
<td>861 F.2d 49</td>
</tr>
<tr>
<td>SEC v. Cymaticolor Corp.,</td>
<td>106 F.R.D. 545</td>
</tr>
<tr>
<td>Trustees of the Plumbers and PipefittersNational Pension Fund v.</td>
<td>886 F. Supp. 1134</td>
</tr>
<tr>
<td>United States v. $61,433.04 in U.S. Currency and 1699 Bynwood Circle</td>
<td>818 F. Supp. 135</td>
</tr>
<tr>
<td>United States v. $250,000 in U.S. Currency</td>
<td>808 F.2d 895</td>
</tr>
<tr>
<td>United States v. Kordel</td>
<td>297 U.S. 1</td>
</tr>
<tr>
<td>United States v. Parcels of Land</td>
<td>903 F.2d 36</td>
</tr>
<tr>
<td>United States v. Schmidt</td>
<td>816 F.2d 1477</td>
</tr>
<tr>
<td>U.S. v. Melchor Moreno</td>
<td>536 F.2d 1042</td>
</tr>
<tr>
<td>Wilson v. United States</td>
<td>149 U.S. 60</td>
</tr>
<tr>
<td>In Re Worldcom, Inc. Securities Litigation</td>
<td>2002 U.S. Dist. LEXIS 23172</td>
</tr>
</tbody>
</table>
THE FIFTH AMENDMENT PRIVILEGE IN CIVIL LITIGATION

I. INTRODUCTION

In the early 1980’s, Dallas, Texas was a hot-bed of parallel proceedings involving bank officers, savings and loan owners, and tax shelter promoters. Twenty years later tax shelter promoters are the focus once again, along with business executives from all industries, particularly those which are publicly traded. The explosion of parallel proceedings receives nearly daily covering in the *Dallas Morning News*, *Wall Street Journal*, and *The New York Times*. There is a rapidly accelerating tendency of the government to punish what they view as “anti-social behavior” with civil remedies such as injunctions, forfeitures, restitution, and civil fines. In addition, the invigorated False Claims Act provides substantial monetary incentives for whistleblowers to bring quasi criminal allegations against present and former employers.

The growth of civil litigation which carries with it criminal overtones is not an accident. The cost of bringing criminal actions and the high burden of proof encourages the government to seek creative civil remedies to address alleged business misconduct. Moreover, the plaintiffs' bar has moved heavily into this area in response to tort reform. One of the most difficult choices faced by defense counsel is whether to advise a client to assert the Fifth Amendment privilege in a civil proceeding because of the inherent risk of a parallel criminal prosecution.

This paper is intended to survey the availability of the Fifth Amendment privilege in civil cases, describe what a witness must do to properly invoke the Fifth Amendment, and report what steps must be taken by opposing counsel to inform the jury of the assertion of the Fifth Amendment privilege. This paper will also briefly address jury instruction issues, Fifth Amendment privilege in civil forfeiture proceedings, and other costs of assertion of the Fifth Amendment privilege. Finally, this paper will briefly address relief that may be sought by parties facing the cruel dilemma of parallel proceedings.

II. AVAILABILITY OF FIFTH AMENDMENT PRIVILEGE

- The Fifth Amendment provides that “no person shall be compelled in any criminal case to be a witness against himself.” U.S. CONSTITUTION AMENDMENT V. It has long been recognized that the Fifth Amendment privilege against self incrimination may be invoked in civil proceedings. *See Pillsbury v. Convoy, 459 U.S. 248 (1983)*
- A witness has a privilege under the Fifth Amendment to decline to respond to a question – the answer to which would tend to incriminate him or her. That is, the witness’ testimony would tend to indicate that the witness was guilty of a crime, or the testimony would furnish a link in the chain of evidence needed to prosecute the witness for a crime.
- Failure to invoke the privilege waives it, and statements given in a civil case may then be used in a subsequent criminal prosecution. *See United States v. Kordel, 297 U.S. 1 (1970)*

III. HOW DOES A WITNESS INVOKE HIS FIFTH AMENDMENT PRIVILEGE IN CIVIL PROCEEDINGS?

- The party invoking the privilege is not entitled to a blanket invocation of the privilege, but must make a specific showing that a response “will pose a substantial and real hazard of subjecting the party to criminal liability.” *United States v. Schmidt, 816 F.2d 1477, 1482 (10th Cir. 1987)*.
- A proper assertion of the Fifth Amendment privilege requires three elements:
  (1) a compelled disclosure;
  (2) found to be testimonial;
  (3) which is incriminating.

*See In Re Hunt, 153 B.R. 445, 452 Note 11 (Bankr. N.D.Tex. 1992)*.

- Upon assertion of the privilege, the court should undertake a two step analysis:
  (1) Make a determination based not only on the witnesses’ claim that Fifth Amendment privilege applies, but on all circumstances of the case. Does the witness have a reasonable cause to believe that an answer to the question would support a conviction or support a link in the chain? *See Klein v. Smith, 559 F.2d 189 (2nd Cir. 1977)*.
  (2) Examine of the witness on the record regarding his or her claim of privilege to determine whether there are reasonable grounds to believe that being compelled to answer the question will subject the witness to danger of incrimination. *U.S. v. Melchor Moreno, 536 F.2d 1042 (5th Cir. 1976)*.

IV. MAY A NEGATIVE INFERENCE BE DRAWN FROM THE INVOCATION OF FIFTH AMENDMENT PRIVILEGE IN CIVIL PROCEEDINGS?

- While the Fifth Amendment expressly forbids negative inferences from assertion of the right not to testify, “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: the Amendment does not preclude the inference where the privilege is claimed by a party to a civil cause”  

*Baxter v. Palmigiano, 425 U.S. 308, 319 (1976).*

**V. IF A NEGATIVE INERENCE MAY BE DRAWN WHAT ARE THE CONDITIONS PRECEDENT TO DRAWING SUCH AN INERENCE?**

The court must first determine whether probative evidence was offered against which a negative inference can be drawn by assertion of the Fifth Amendment privilege.  

*Baxter, 425 U.S. at 419.* Evidence is probative if it has a “logical relevance.” This standard has been applied in numerous cases:

(1)  

**Baxter v. Palmigiano.** An inmate at a Rhode Island state prison was charged with inciting a prison disturbance and summoned before prison authorities. Palmigiano was informed he might be prosecuted for violation of State law and that he should consult with an attorney. He was further advised that he had a right to remain silent, but that if he did so his silence could be held against him. Palmigiano refused to testify. He was not automatically found guilty of the infraction with which he was charged. Under Rhode Island law, disciplinary decisions were required to be based on substantial evidence manifested in a record of the disciplinary proceedings. Further, under Rhode Island law, it was clear that an inmate’s silence in and of itself was insufficient to support any adverse decision by the disciplinary board. The Supreme Court determined that probative evidence had been exhibited against Palmigiano, and permitted the disciplinary board to draw negative inferences from Baxter’s refusal to testify. The Supreme Court refused to overturn Palmigiano’s punishment finding, in effect, that the disciplinary board hearings were civil proceedings.

(2)  

**Lefkowicz v. Cunningham.** The Supreme Court clarified its decision by explaining that “Baxter did no more than permit an inference to be drawn in a civil case from a party’s refusal to testify” but noted that silence “was only one of a number factors to be considered.”  

*Lefkowicz v. Cunningham, 431 U.S. 808, Note 5 (1977).*

(3)  

**In Re Grant.** In this bankruptcy decision, the court examined whether a negative inference could be drawn by the court by the witness’ invocation of his Fifth Amendment privilege. The court reiterated that the standard set out in  

*Baxter* and examined the independent evidence to determine whether a negative inference should be drawn. The court explained that “critical to the analysis of the Baxter court was the concept that the “adverse inferences” against the asserting party were triggered by the introduction of probative evidence by the adverse party, finding that it was “undisputed that an inmate’s silence in and of itself was insufficient to support an adverse decision by the disciplinary board.  

*In re Grant, 237 B.R. 97, 110-111 (Bankr. E.D. Va. 1999).* After determining that probative evidence had been offered by the plaintiff, the court drew a negative inference from the assertion of the Fifth Amendment privilege by Grant.

(4)  

**Caucus Distributors.** United States of America filed an involuntary bankruptcy petition against Caucus Distributors and several other entities. It attempted to show the debtor was generally not paying his debts as they came due. In pretrial discovery representatives of Caucus asserted their Fifth Amendment privilege. The United States then moved for summary judgment, arguing that negative inferences should be drawn based on the assertion of the Fifth Amendment privilege. The court applied the  

*Baxter* standard and found there had been no probative evidence introduced consistent with the standards enunciated by the Supreme Court. The court declined to draw any negative inference.  


**VI. JURY INSTRUCTION ISSUES**

- **Criminal Cases.** In both federal and state criminal prosecutions, no adverse inference may be drawn from a witness’ assertion of a Fifth Amendment right to silence. Prosecutors have long been prohibited from raising the issue of a defendant’s privileged silence before the jury.  

*See Griffin v. California, 380 U. S. 609 (1965)* (incorporating Fifth Amendment privilege against self incrimination into 14th Amendment, making it applicable to State prosecutions and making it unconstitutional for State prosecutor to comment defendant’s silence as evidence of guilt;  

*Wilson v. United States, 149 U.S. 60* (1893) (reversing conviction on grounds that prosecutors commenting on defendant’s failure to take the stand was prejudicial). In fact the defendant may request that the court issue a limiting instruction to the juries directing that they draw no negative inference from the defendant’s failure to testify on her own behalf.  

*See Carter v. Kentucky, 450 U.S. 288 (300) 1981 (finding that the principals enunciated in cases construing the privilege against self-incrimination lead to the conclusion that the Fifth Amendment requires that a criminal*
trial judge must give a “no adverse inference” jury instruction when requested by a defendant.

- Civil Cases. For an example of a thoughtful discussion of jury instructions which must be used in the context of assertions of Fifth Amendment privilege in the civil case see FDIC v. Fidelity & Deposit Company of Maryland, 45 F.3d 969 at 979 (5th Cir. 1995).

- In that case, the Fifth Circuit approved an instruction which stated “A witness has a constitutional right to decline to answer on the grounds that it might tend to incriminate him. When a witness takes the Fifth Amendment you may draw an inference for or against a party in this case. However, before you may draw such an inference you must follow the following analysis:

First, you must find by a preponderance of the evidence that Mr. Ali Pogue who was an employee of the bank, committed a dishonest or fraudulent act within the meaning of the bond. You must make this finding for each of the loans you are considering.

If you satisfy Step 1, before you can draw an inference, you must also find by preponderance of the evidence that the witness, who took the Fifth Amendment, acted in collusion with Mr. Pogue to commit a dishonest or fraudulent act within the meaning of the bond.

If you find by a preponderance of the evidence that the witness acted with Mr. Pogue in committing a dishonest or fraudulent act within the meaning of the bond, then you may draw, but you are not required to draw, an inference which is either favorable or adverse to either party because of the fact that the witness took the Fifth Amendment and refused to answer one or more questions.

If you find that the witness was not acting with Mr. Pogue in connection with the transaction, then you may not draw an inference. Even if you do find that Mr. Pogue was acting dishonestly or fraudulently within the meaning of the bond and you find that the witness was acting with Mr. Pogue in connection with the transaction, you cannot base your verdict solely on that adverse inference. In other words, an adverse inference may not be the sole basis upon which you might impose liability. You have to have other corroborating evidence, whether documents or witnesses testimony, upon which you might impose liability.”

- The Third Circuit approved a jury instruction which stated: “during the trial you also heard evidence by past or present employees of the plaintiff refusing to answer certain questions on the grounds that it may tend to incriminate them. A witness has a constitutional right to decline to answer on the grounds that it may tend to incriminate him. You may, but you need not, infer by such refusal that the answers would have been adverse to the plaintiff’s interest. See RAD Services, Inc. v. Aetna Casualty & Surety Company, 808 F.2d 271, 277 (3rd Cir. 1986).

VII. FIFTH AMENDMENT PRIVILEGE IN CIVIL FORFEITURE PROCEEDINGS

- Civil forfeiture actions differ from most other civil actions in that they are brought by federal prosecutors and are often based on the very same criminal activity that may be prosecuted in a separate criminal proceeding. This dynamic puts defendants in a position of choosing between self-incrimination and loss of property. While the jurisprudence in this arena is unfortunately influenced by the prevalence of Drug Enforcement Agency activities, it’s important to remember that forfeiture arises under 200 forfeiture laws that apply to the broad variety of conduct including tax cases, cases involving money laundering, customs and immigrations violations, income tax violations and illegal gambling. See United States Dept. of Justice Annual Report on Asset Forfeiture Program:

www.USDOJ.gov/jmd/apf/02fundreport/index.htm

- Some courts have dealt with the inherent unfairness of permitting civil forfeiture proceedings to proceed during the pendency of a criminal investigation/prosecution by issuing a protective order staying discovery until the statute of limitations has run or until the pending criminal investigation has been concluded.

- The party must affirmatively request accommodations by filing a motion under Rule 26. CF Digital Equip’t v. Currie Entertainment, 142 FRD 11 (W.D. Mass. 1991) rejecting claimant’s suggestion that trial court should have required government to grant immunity or the court should have granted stay of the forfeiture case, because claimant failed to request either form of relief). See also United States v.
$250,000 in U.S. Currency, 808 F.2d 895, 900-901 (1st Cir. 1987).

VIII. OTHER COSTS OF THE ASSERTION OF FIFTH AMENDMENT PRIVILEGE

A court may strike a claimant’s affidavit in opposition to a motion for summary judgment on the ground that a person may not invoke the Fifth Amendment and at the same time submit denials to allegations in an affidavit. See United States v. Parcels of Land, 903 F.2d 36, 42-44 (1st Cir. 1990); United States v. $61,433.04 in U.S. Currency and 1699 Bynwood Circle, 818 F. Supp. 135, 138 (E.D.N.C. 1993).

It is possible, that a party invoking the Fifth Amendment can still prevail in a civil lawsuit even where he or she does not testify, if other evidence and other witness testimony can carry the burden. See City of Chicago v. Reliable Truck Parts Company, Inc., 822 F. Supp. 1288, 1293-94 (N.D. Ill. 1993) (Defendants may rely on evidence other than privileged testimony and may not be precluded from offering evidence because of invocation of privilege). In SEC v. Graystone Nash, Inc., 25 F.3d 187 (3rd Cir. 1994) the Third Circuit reversed a lower court decision precluding the defendants from offering other evidence. The court found that the invocation of the Fifth Amendment privilege requires the trial court to “carefully balance the interests of the party claiming protection against self-incrimination and the adversary’s entitlement to equitable treatment.” Any accommodation in which a trial court provides must be “necessary” to balance those interests. Because the privilege is constitutionally based, to the detriment of the party asserting it should be no more than is necessary to prevent unfair and unnecessary prejudice to the other side. The Court of Appeals rejected the “severe remedy of barring defendants from presenting any evidence from third parties” as unnecessary. Rather than simply “level the playing field” the Third Circuit found that the preclusion order “tilted it strongly in favor of the government” but the SEC v. Cymaticolor Corp., 106 F.R.D. 545, 549-50 (S.D.N.Y. 1985) ordering total preclusion when party asserted privilege with regard to basis of its defenses and denials).

IX. THE FIFTH AMENDMENT AND NON-PARTY WITNESS INVOCATION

In certain circumstances a non-party witness invocation of the Fifth Amendment has been found to be admissible in civil proceedings. Obviously, Federal Rule of Evidence 403 must be applied with great care by the presiding judge. Initially courts would not permit invocation of the Fifth Amendment to be considered unless an agency relationship existed between the party and the invoking witness. Importantly, the Fifth Circuit has eliminated this requirement all together. See FDIC v. Fidelity & Deposit Company of Maryland, 45 F.3d 969, 978 (5th Cir. 1995) (allowing the jury to draw inferences from the silence of a witness who received fraudulent loans from the defendant).

X. RELIEF FROM DISCOVERY IN CIVIL CASES

Given the constitutional problems raised by parallel proceedings, the courts have drawn upon their equitable powers to issue protective orders or orders staying discovery in civil proceedings. See Integrated Generics, Inc. v. Bowen, 678 F. Supp. 1004, 1009 (E.D. NY 1988); C3Inc. v. United States, 5 Cl. Ct. 659, 661 (1984). Creative application by counsel, and the court may lead to tailoring the stay to respond to and balance each party’s concerns. See SEC v. Chestman, 861 F.2d 49, 50 (2nd Cir. 1988) (allowing the government to intervene in a civil case for the sole purpose of staying discovery pending the outcome of a parallel criminal investigation).

Not surprisingly, the government has much greater success in obtaining stays or orders to defer production of evidence than do private litigants.

In a recent opinion out of the Southern District of New York in the In Re Worldcom, Inc. Securities Litigation, 2002 U.S. Dist. LEXIS 23172 (S.D. N.Y.), the court granted motions to stay filed by two of the individual defendants who were already indicted in the Southern District of New York for conduct which underlies the civil securities litigation. It is important to note that the U.S. Attorney for the Southern District of New York submitted a letter supporting the grant of stay as to the indicted individuals.

In deciding whether to enter a stay, courts consider numerous factors including:

(1) the extent to which issues in the criminal case overlap with those presented in the civil case;
(2) the status of the case, including whether the defendants have been indicted;
(3) the private interests of the plaintiffs in proceeding expeditiously weighted against the prejudice to the plaintiffs caused by the delay;
(4) the private interests of and burden on the defendants;
(5) the interest of the court; and
(6) the public interest.

See Trustees of the Plumbers and Pipefitters National Pension Fund v. Transworld Mechanical, Inc., 886