IMPLICATIONS OF CRIMINAL PROSECUTION ON BANKRUPTCY

Southeastern Bankruptcy Law Institute 2024

FIFTH AMENDMENT OVERVIEW

"No person … shall be compelled in any criminal case to be a witness against himself." U.S. CONST. Amend. V.

Courts have extended the privilege against self-incrimination to any information that "***would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime***." *Hoffman v. United States*, 341 U.S. 479, 486, 71 S. Ct. 814, 818, 95 L. Ed. 1118 (1951).

THE VALUES UNDERLYING THE FIFTH AMENDMENT

The Supreme Court has said the 5A reflects "many of our fundamental values and most noble aspirations," including:

- Unwillingness to subject crime suspects to ***cruel trilemma*** of self-accusation, perjury, or contempt;
- Preference for ***accusatorial over inquisitorial*** justice system;
- 5A privilege may at times be a "shelter to the guilty," but it is often a "***protection to the innocent***;"

FIFTH AMENDMENT: A BALANCING ACT

Courts ***balance*** 5A values and other social goals:

- *United States v. White* (1944) (right against self-incrimination does not apply to organizations because enforcing many federal and states laws would become "impossib[le].")
- *McKune v. Lile* (2002) (upholding state program requiring inmates in sex abuse treatment to admit prior conduct)
- *Baltimore Dep't of Soc. Servs. V. Bouknight* (1990) (requiring mother to produce child at demand of DFACS)
- *California v. Byers* (1971) (upholding law criminalizing leaving auto accident without giving name/address)

ELEMENTS OF THE FIFTH AMENDMENT:

"To qualify for the Fifth Amendment privilege, a communication must be ***testimonial***, ***incriminating***, and ***compelled***."

Hiibel v. Sixth Judicial Dist. Court of Nevada, Humbolt County, 542 U.S. 177, 189 (2004)

THE MEANING OF SELF INCRIMINATION

Information is self-incriminating if it may subject the speaker, or lead to other information that may subject the speaker, to the possibility of criminal prosecution or criminal penalties.

- *Kastigar v. United States*, 406 U.S. 441 (5A "protects against any disclosures that the witness reasonably believes may be used in a criminal prosecution or could lead to other evidence that might be so used.")

- *Hoffman v. United States*, 341 U.S. 479 (1951) (5A "not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime")

THE MEANING OF SELF INCRIMINATION

Concern must be substantial and real, not merely trifling or imaginary.

5A protection extends to the ***possibility*** of criminal prosecution, ***not*** the ***probability***.

A disclosure that could implicate the witness in activity prohibited by a criminal statute is usually sufficient to justify invocation of the privilege.

5A privilege applies not only to answers that would themselves be admissible in a criminal prosecution, but also to answers that would furnish a “link in the chain” of evidence that could be used to prosecute. (This means can claim innocence and invoke 5A.)

HOW COURTS EVALUATE WHETHER TESTIMONY IS INCRIMINATING

Courts ***rarely*** overrule 5a invocation on grounds that response is not sufficiently incriminating. Why? Breadth of criminal laws.

Exceptions:

1. Testimony that may become incriminating through future conduct
2. Potential for prosecution barred by SOL or other complete defense (e.g., double jeopardy)
3. Illegal acts performed at government's direction as a cooperator
4. Fear of prosecution outside the U.S.
5. Civil hardships not enough

THE MEANING OF COMPULSION

General test: “Whether, considering the totality of the circumstances, the free will of the witness was overborne.”

- Classic example: Grant of immunity.
- Penalty cases vs. Involuntary confessions under 5A Due Process Clause.
- Outside of depriving a person of government employment or a professional license, ***few*** Supreme Court decisions have found penalties on out-of-court exercise of the 5A to be impermissible.
- Many forms of government pressure to make incriminating admissions have been found to lack compulsion.
- Private compulsion v. public compulsion.

THE MEANING OF TESTIMONIAL

While the Supreme Court has not set forth a single test, its rulings establish that testimony includes both spoken words ***and*** non-verbal acts communicating the contents of a person's mind.

Hubbell: "The assembly of these documents was like telling an inquisitor the combination to a wall safe," a clear testimonial communication.

Compelled extraction of physical evidence is ***not*** testimonial.

COLLECTIVE ENTITY DOCTRINE

Corporate entities may not invoke the Fifth Amendment. Corporations have First Amendment rights, but not Fifth Amendment Rights.

An individual acting on behalf of the corporation in producing documents cannot assert the Fifth Amendment.

Questions:

- Does the collective entity doctrine apply to former employees?
- Does the collective entity doctrine apply to single member LLCs?

HOW COURTS EVALUATE THE VALIDITY OF FIFTH AMENDMENT ASSERTION

Witness's invocation of 5A is not enough. Court must evaluate the claim.

Hoffman gives witness's significant power to determine what disclosures are sufficiently incriminating.

In criminal proceedings (e.g.,grand juries, criminal trials), 5A invocation is rarely challenged.

In civil proceedings, 5A invocation is challenged more.

INVOCATION OF FIFTH AMENDMENT

- 5A privilege is not self-executing. It must be invoked in language that "may reasonably be expected" to express an attempt to invoke.
- In a civil proceeding, a party may assert the privilege against self-incrimination at any stage of the proceedings.
- Blanket invocations not permitted. Party must invoke on a per-allegation or per-question basis.
- Non-parties may assert 5A too (e.g., subpoena recipients). 5A log may be required.

WAIVER AND RISK OF WAIVER

- Law on waiver of 5A right against self-incrimination is less than clear, but some principles emerge:
  - Waiver is proceeding-specific because conditions may change
  - Waiver must be voluntary
  - Waiver need not be knowing
- Caution advised.

THE STIGMA OF INVOKING THE FIFTH AMENDMENT

Stigma may never disappear, but 5A is intended to protect the innocent, especially in complex criminal investigations with gray areas.

Can invoke the 5A by citing to it, no reference to "self-incrimination" required. (Note: Referring to "due process" or "rights" without more detail may not be clear enough to establish invocation).

Witnesses who invoke the 5A are allowed to make a statement of innocence as part of their invocation but must avoid factual admissions supporting the assertion of innocence to avoid waiver of the privilege. (*See, e.g.*, statement of WorldCom CEO, Bernard Ebbers, to House Financial Services Committee)

CONSEQUENCES OF INVOKING THE FIFTH AMENDMENT

Adverse Inference

- Almost every federal circuit and most state courts have recognized that a fact-finder may draw an adverse inference from a 5A-based refusal to testify.
- Fact-finder not required to accept adverse inference.
- Prejudicial effect of the adverse inference may exceed its probative value.

Sanctions for Using 5A Shield as Sword

- Dismissing asserting party's claims for relief
- Precluding asserting party's evidence on topic of 5A
- Striking asserting party's testimony

BANKRUPTCY ACT PROVIDED IMMUNITY

The Bankruptcy Code's predecessor, the Bankruptcy Act, insulated a debtor, providing: "[no] testimony given by [a debtor] shall be offered in evidence against [a debtor] in any criminal proceeding," but the modern Bankruptcy Code includes no such immunity.

> *In re Hulon*, 92 B.R. 670, 673 (Bankr. N.D. Tex. 1988); *see* Bankruptcy Act § 7(a)(10) (former 11 U.S.C. § 25(a)(10)); 11 U.S.C. § 344.

The bankruptcy process, unlike a criminal prosecution—which must protect accused individuals from assisting the government in meeting its burden of proof—"places greater emphasis on full disclosure of an individual's financial affairs for the benefit of all creditors of the debtor's estate and thus affords the debtor only a thin shield against wide-ranging discovery."

> *In re Hulon*, 92 B.R. 670, 673 (Bankr. N.D. Tex. 1988).

ELEMENTS OF FIFTH AMENDMENT ASSERTION

COMPELLED

Usually satisfied by Bankruptcy Code requirements or subpoenas

TESTIMONIAL

Satisfied by Schedules, Statement of Financial Affairs, § 341(a) Meetings, Rule 2004 Examinations

INCRIMINATORY

Often not contested, but when at issue, debtor has burden to show credible reasons why his answers might incriminate him

FUNDAMENTAL BANKRUPTCY TASKS

SCHEDULES AND STATEMENT OF FINANCIAL AFFAIRS

"[W]hile the Fifth Amendment protects his right not to testify, the Fifth Amendment does not excuse a bankruptcy debtor from filing schedules in the case." *United States Tr. v. Gregg (In re Gregg)*, 510 B.R. 614, 625 (Bankr. W.D. Mo. 2014).

§ 341(a) MEETING AND RULE 2004 EXAMINATION

Both § 341(a) Meeting and Rule 2004 Examination considered testimonial, and debtor can assert 5A privilege in either setting.

See In re Connelly, 59 B.R. 421, 431-32 (Bankr. N.D. Ill. 1986); *see also In re* Cotillion Invs., Inc., 343 B.R. 344, 351 (Bankr. S.D. Fla. 2006).

TURNOVER OF ESTATE PROPERTY: §§ 521(a)(4) and 542

Generally, not protected by 5A, because not considered testimonial.

ACT OF PRODUCTION DOCTRINE

PRODUCTION OF DOCUMENTS MAY IMPLICITLY COMMUNICATE:

(1) The existence of documents;

(2) The authenticity of documents; and

(3) Possession and control of documents.

United States v. Hubbell, 530 U.S. 27 (2000).

EXCEPTIONS:

The Foregone Conclusion Doctrine

Applies where “the existence and location of documents is a ‘foregone’conclusion.’”

The Required Records Doctrine

Applies where:

(a) The inquiry is regulatory;

(b) The records are of a kind customarily kept; and

(c) The records have assumed “public aspects which render them at least analogous to public documents.”

In re HJH Consulting Grp., Inc., Case No. 18-50788-RBK, 2018 Bankr. LEXIS 2579, at *2-3.

COLLECTIVE ENTITY DOCTRINE

The privilege against self-incrimination does not apply to an entity.

Where the individual participates in a corporate entity, the right to withhold production of the entity's documents does not exist.

Kossoff, PLLC v. Togut (In re Kossoff, PPLC), Case No. 21 Civ. 7122, 2021 U.S. Dist. LEXIS 189366, *2-3 (S.D.N.Y. Sept. 20, 2021).

WAIVER

Waiver should be inferred only in the “most compelling circumstances.”

Gebhardt v. Saunders (In re Saunders), 528 B.R. 860, 867 (Bankr. N.D. Ga. 2015) (quoting *Klein v. Harris*, 667 F.2d 274, 287-88 (2d Cir. 1981)).

TWO-PART TEST TO INFER WAIVER

(1) Whether the debtor's prior statements have created a significant likelihood that the finder of act will be left with and prone to rely on a distorted view of the truth; and

(2) Whether the debtor had reason to know that prior statements would be interpreted as a waiver of the privilege.

Gebhardt v. Saunders (In re Saunders), 528 B.R. 860, 867 (Bankr. N.D. Ga. 2015) (quoting *Klein v. Harris*, 667 F.2d 274, 287-88 (2d Cir. 1981)).

Second part of *Klein* Test called into question.

In re Flint Water Cases, 53 F.4th 176, 206 (6th Cir. 2022), *reh'g denied*, No. 22-1353, 2023 WL 370653 (6th Cir. Jan. 5, 2023).

WAIVER BY ORAL TESTIMONY

"A testimonial waiver occurs when a party voluntarily under oath in the same proceeding provides incriminating facts."

> *Gebhardt v. Saunders (In re Saunders)*, 528 B.R. 860, 867 (Bankr. N.D. Ga. 2015).

"For a court to find waiver of the Fifth Amendment privilege, it is not enough that a party generally testifies as to a topic. Instead, the party must have already provided testimony that in and of itself is incriminating and that is specific to the topic where the questioner wants additional detail."

> *In re Yates*, Case No. 04-05619-LT7, 2008 Bankr. LEXIS 4406, at *28 (S.D. Cal. June 17, 2008) (citing *Rogers v. United States*, 340 U.S. 367, 373 (1951); *In re Mudd*, 95 B.R. 426, 429 (Bankr. N.D. Tex. 1989)).

WAIVER

WAIVER BY CONDUCT/PLEADINGS

Because the debtor “decided voluntarily to make these statements in his [a]nswer, he would thereafter be required to supply the details about these statements.”

Am. Eagle Bank v. Friedman (In re Friedman), 543 B.R. 833, 842 (Bankr. N.D. Ill. 2015).

“[T]he [d]ebtor, by voluntarily filing his bankruptcy schedules, did waive his Fifth Amendment privilege with respect to questions concerning the statements and schedules themselves, as well as specific questions concerning specific information contained in the statements and schedules.”

Court allowed debtor to invoke 5A privilege as to related “follow-up” questions beyond the information expressly stated in the Schedules.

In re Brandenburg, Case No. 06-30709, 2007 Bankr. LEXIS 230, at *12–13 (Bankr. E.D. Tenn. Jan. 10, 2007).

WAIVER

WAIVER BY CONDUCT/PLEADINGS

Debtor's failure to assert the 5A privilege in response to questions on his Schedules and SOFA constituted a waiver of his right not to answer questions on the same topics at his § 341(a) Meeting.

> *United States Bankruptcy Administrator v. LaForce (In re LaForce)*, 593 B.R. 853 (Bankr. S.D. Ala. 2018).

"[T]his Court concludes that Debtor is protected from answering any questions regarding [documents produced under Rule 2004] in this matter or concerning his bankruptcy schedules[.]"

> *In re Gray*, Case No. G07-22331-REB, 2008 Bankr. LEXIS 4352 (Bankr. N.D. Ga. Oct. 14, 2008).

WAIVER

SUBJECT "PROCEEDING"

"[A] waiver of the privilege [against self-incrimination] does not affect the debtor's right to assert the privilege in another proceeding . . . . Many proceedings may be brought within a single bankruptcy case.

In re Hulon, 92 B.R. 670 (Bankr. N.D. Tex. 1988).

"[T]he bankruptcy case-in-chief was a separate proceeding from the [turnover] adversary proceeding."

In re Liberty Asset Mgmt. Corp., Case No. CV 18-0365-DOC, 2019 U.S. Dist. LEXIS 22000 (C.D. Cal. Feb. 8, 2019).

"The Court believes that the testimony requested through the Interrogatories is a continuation of the 341(a) meeting testimony and other main case discovery . . . to locate and identify assets. As such, if a waiver occurred in the 341(a) testimony or main case discovery, the Court easily would find that waiver occurred in the same proceeding as the Interrogatories."

In re Yates, Case No. 04-05619-LT7, 2008 Bankr. LEXIS 4406, at *25-26 (S.D. Cal. June 17, 2008).

ADVERSE INFERENCES

The court may draw an adverse inference when a litigant asserts the Fifth Amendment privilege.

> *McCormick v. Banc. Once Leasing Corp.*, 49 F.3d 1524 (11th Cir. 1995).
>
> *Snider v. Rogers (In re Rogers)*, Case No. 17-21187-PRW, Adv. No. 18-2001-PRW, 2018 Bankr. LEXIS 187, at *9 (Bankr. W.D.N.Y. Jan. 25, 2018).

A party seeking to rely on a negative inference must introduce independent admissible evidence to support use of negative inference.

"However, the independent evidence alone does not need to independently sustain a party's burden of proof; the adverse inference may be included in the evidence that weighs in favor of the burden of the party relying on the adverse inference."

> *Markwood Invs., Ltd. v. Neves (In re Neves)*, 638 B.R. 220, 230 (Bankr. S.D. Fla. 2014).

ADVERSE INFERENCES

DISMISSAL OF CASE

"The [d]ebtors' refusal to provide information, even under the assertion of the Fifth Amendment, is grounds for the dismissal of this bankruptcy proceeding."

> *In re Wisler*, Case No. 00-5546-FJO-13, 2000 Bankr. LEXIS 1971, at *8 (Bankr. S.D. Ind. Nov. 30, 2000).

Dismissal is not a penalty for invoking the 5A. Though an individual has the constitutional right to assert the Fifth Amendment, a person "does not have a constitutional right to receive relief under the bankruptcy laws."

> *Knedlik v. Spark Networks LTD. (In re Knedlik)*, Case No. WW-08-1011-KuKJu, 2008 Bankr. LEXIS 4670, at *22-25 (B.A.P. 9th Cir. June 30, 2008).

ADVERSE INFERENCES

PLAN CONFIRMATION

"[T]he debtor's assertion of the Fifth Amendment in a related adversary proceeding, standing alone, when all other aspects of his Chapter 11 Plan of Reorganization are consistent with the goals of the Bankruptcy Code, is not sufficient evidence of bad faith to merit the denial of his plan."

> *McCormick v. Banc One Leasing Corp. (In re McCormick)*, 49 F.3d 1524, 1526 (11th Cir. 1995).

The debtor's invocation of Fifth Amendment privilege in response to question of Statement of Financial Affairs and Schedule of Assets and Liabilities "impedes the administration of his bankruptcy case."

Requested information essential for determining whether debtor's plan was confirmable.

> *In re Wineck*, 202 B.R. 161, 169 (Bankr. M.D. Fla. 1996).

PARALLEL PROCEEDINGS

CRIMINAL PROCEEDINGS

Not subject to stay under 11 U.S.C. § 362(b)(1):

(b) The filing of a petition . . . does not operate as a stay—

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor[.]

PARALLEL PROCEEDINGS

INJUNCTION FOR STAY VIOLATION OF CRIMINAL CASE

Contempt

11 U.S.C. § 362(b)(1) and 11 U.S.C. § 105(a)

A bankruptcy court may enjoin a criminal prosecution in "extraordinary circumstances."

In the two-pronged test for "extraordinary circumstances," debtor must prove:

(1) Existence of a threat of great and immediate injury; and
(2) The injunction is necessary to preserve a federally protected right.

> *Smith v. Goode (In re Smith)*, 301 B.R. 96, 100 (Bankr. M.D. Ga. 2003) (citing *Barnette v. Evans*, 673 F.2d 1250, 1252 (11th Cir. 1982) (citing *Younger v. Harris*, 401 U.S. 37, 46 (1971))).

Variety of different tests to determine whether prosecution of a debtor is an effort to collect a debt or for some other legitimate purpose.

(1) The bad faith test;
(2) The irreparable harm test; and
(3) The principal motivation test.

> *Smith v. Goode (In re Smith)*, 301 B.R. 96, 100 (Bankr. M.D. Ga. 2003).

PARALLEL PROCEEDINGS

STAY OF CIVIL ACTION

"Courts may stay a civil case to preserve a witness's Fifth Amendment Privilege rights."

Palolian v. Byline Bank (In re Kowalski), 633 B.R. 822, 827 (Bankr. Ill. 2021).

To warrant staying an adversary proceeding, a court must find that the invocation of 5A will result in "certain loss by automatic summary judgment."

McDermott v. Kelter (In re Kelter), 587 B.R. 187, 194 (Bankr. N.D. Ga. 2018) (quoting *Global Aero., Inc. v. Platinum Jet Mgmt., LLC,* Case No. 09-60756-CIV-COHN-SELTZER, 2009 U.S. Dist. LEXIS 81380 (S.D. Fla. Aug. 19, 2009)).

PARALLEL PROCEEDINGS

DRIVER'S LICENSE SUSPENSIONS

11 U.S.C. § 362(a), (b)(2)(D), and (b)(4)

11 U.S.C. § 524(a)

11 U.S.C. § 105(a)

DISCHARGE/ DISCHARGEABILITY

OBJECTIONS TO DISCHARGE

11 U.S.C. § 727(a)(2)(B) and (a)(4)

REFUSAL TO TESTIFY

11 U.S.C. § 727(a)(6)(B)

> The court shall grant the debtor a discharge unless the debtor has refused, in the case on the ground of privilege against self-incrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked.

11 U.S.C. § 727(a)(6)(C)

> The court shall grant the debtor a discharge unless the debtor has refused, in the case on a ground other than the properly invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify.

OBJECTIONS TO DISCHARGEABILITY

11 U.S.C. § 523(a)(1)(C), (a)(2)(A), (a)(4), (a)(13)

DUTY TO MAKE CRIMINAL REFERRAL

JUDGES, TRUSTEES, RECEIVERS

18 U.S.C. § 3057, duty

Reasonable belief of violation

BANK OFFICERS

18 U.S.C. § 1014, duty

CREDITORS

May make a criminal referral

Motivation of the party filing the criminal complaint

ATTORNEYS

Duty under Bar Rules

Must report future crime of client;
Suspected crime of client

OTHER EXAMPLES OF POSSIBLE INTERSECTION WITH CRIMINAL LAW

Petition preparers 18 U.S.C. § 156

Applications for unclaimed funds

Preference actions

THANK YOU