YOU HAVE THE RIGHT TO REMAIN SILENT: HELPING YOUR DEBTOR IN TROUBLE

The Intersection of Criminal Law with the Bankruptcy Code

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I. Introduction

This article explores the connection between the United States Bankruptcy Code and criminal prosecutions. The article pays special attention to issues connected to a debtor's privilege under the Fifth Amendment.[1] Additionally, the article discusses key points in which criminal prosecutions and bankruptcy proceedings overlap. Statutory references herein are to Title 11 of the United States Code (the "Bankruptcy Code"), unless otherwise specified.

Judge Carter and Mr. Bouchard thank Leon Jones and Judge Carter's law clerks, Siena Berrios Gaddy and E. Tate Crymes, for their significant and invaluable assistance in preparing these materials.

[1] Case law on the Fifth Amendment right to remain silent is vast. These materials do not, and are not intended to, survey comprehensively that case law.

II. Fundamental Issues Relating to the Fifth Amendment

A. Background on the privilege against self-incrimination

The United States Constitution provides: "No person . . . shall be compelled in any criminal case to be a witness against himself[.]"[2] The Fifth Amendment "privilege against self-incrimination protects a person from being compelled to give testimony that might" assist in the development of evidence used in the criminal prosecution of that person.[3]

While the text of the Fifth Amendment does not refer to civil litigation, the Fifth Amendment privilege against self-incrimination applies in both civil and criminal matters, including bankruptcy cases.[4] The Bankruptcy Code's predecessor, the Bankruptcy Act, insulated a debtor, providing that: "[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.[5] To the contrary, a debtor's testimony may be used in a criminal proceeding.[6] Thus, a debtor may invoke the privilege against self-incrimination in a bankruptcy proceeding.[7]

The Fifth Amendment privilege "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

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2 U.S. CONST. Amend. V.

3 *In re* Hulon, 92 B.R. 670, 673 (Bankr. N.D. Tex. 1998).

4 *See, e.g.,* McCarthy v. Ardstein, 266 U.S. 34, 40 (1924); *see also* Kastigar v. United States, 406 U.S. 441, 444 (1972) (the Fifth Amendment privilege "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory"); McCormick v. Bank One Leasing Corp., 49 F.3d 1524 (11th Cir. 1995).

5 *Id.*; *see* Bankruptcy Act § 7(a)(10) (former 11 U.S.C. § 25(a)(10)); 11 U.S.C. § 344.

6 *Hulon*, 92 B.R. at 673.

7 *Id.*

prosecute the claimant for a federal crime."[8] "The witness [must have] reasonable cause to apprehend danger from a direct answer.[9]" Stated differently, an individual seeking to invoke the privilege against self-incrimination must prove that the "compelled disclosures will themselves confront the [individual] with substantial hazards of self-incrimination."[10]

After an individual invokes the privilege, a court may be called upon to decide whether the witness's invocation is justified.[11] "A witness's fear of prosecution cannot be merely 'trifling or imaginary,' but must be 'substantial and real.'"[12] A court should consider the factual support submitted by the individual, along with its "personal perception of the peculiarities of the case" to determine if invocation of the privilege is warranted.[13]

To qualify for the privilege against self-incrimination, the potential communication must be testimonial, incriminating, and compelled.[14] An individual

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8 Hoffman v. United States, 341 U.S. 479, 486 (1951) (citing Blau v. United States, 340 U.S. 159 (1950)).

9 *Id*.; Kastigar v. United States, 406 U.S. 441, 445 (1972) (Fifth Amendment applies to any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used); United States v. Argomaniz, 925 F. 2d 1349, 1353 (11th Cir. 1991).

10 California v. Byers, 402 U.S. 424, 429 (1971).

11 Hoffman v. United States, 341 U.S. 479, 486–87 (1951).

12 Melarango v. Ciotti (*In re* Ciotti), 442 B.R. 412, 415 (Bankr. W.D. Pa. 2011) (quoting Pansier v. Wis. Dep't. of Revenue, Case No. 10-C-0550, 2010 U.S. Dist. LEXIS 112990, at *3 (E.D. Wis. Oct. 13, 2010)).

13 *In re* Kwok, 653 B.R. 480, 493 (Bankr. D. Conn. 2023) (quoting *Hoffman*, 341 U.S. 479 at 487).

14 Fisher v. United States, 425 U.S. 391, 408 (1976) ("It is also clear that the Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a testimonial communication that is incriminating.").

may not make a blanket assertion of the privilege against self-incrimination.[15] Rather, an individual must invoke the privilege against self-incrimination question-by-question or request-by-request. [16] The prohibition on blanket assertions prevents an individual from refusing to testify indiscriminately without evaluating whether the information sought may raise a substantial and real threat of incrimination.[17] Corporations and other entities cannot invoke the privilege against self-incrimination because "a corporation has no Fifth Amendment privilege."[18]

In *Gebhardt v. Saunders (In re Saunders)*,[19] the Bankruptcy Court for the Northern District of Georgia denied the United States trustee's motion to compel a debtor to answer oral questions at a deposition. The court considered two questions: (1) whether the debtor could invoke the privilege against self-incrimination, and (2) whether the debtor waived the right to invoke such privilege.[20] In its analysis, the court inquired into the debtor's right to invoke the privilege against self-incrimination as it pertained to the debtor's Statement of Financial Affairs.[21] The debtor refused to answer the trustee's questions—specifically, the debtor invoked the privilege against self-incrimination when the trustee asked the debtor whether an answer provided on the Statement of Financial

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15 Nat'l Physicians Holding Co. v. Middlebury Equity Partners, LLC, No. 7:09-CV-21, 2018 U.S. Dist. LEXIS 30121, at *5 (M.D. Ga. Feb. 26, 2018) (citing United States v. Roundtree, 420 F.2d 845, 852 (5th Cir. 1969)).

16 *Id*. (citing *Roundtree*, 420 F.2d at 852).

17 *Id*. (citing *Argomaniz*, 925 F.2d at 1353).

18 *In re* Hyde, 235 B.R. 539, 542 (S.D.N.Y. 1999).

19 528 B.R. 860, 867 (Bankr. N.D. Ga. 2015) (Sacca, J.).

20 *Id*. at 863.

21 *Id*. at 866–68.

Affairs was correct.[22] The Court noted that the trustee was in effect asking whether the debtor committed perjury.[23] Denying the motion to compel, the court explained that requiring the debtor to answer could "subject [them] to a possibility of criminal liability that is beyond 'merely trifling, or imaginary, hazards of incrimination.'"[24]

B. The Bankruptcy Code recognizes that individuals may invoke the Fifth Amendment right against self-incrimination in bankruptcy cases

As stated above, the privilege against self-incrimination applies in civil suits, including bankruptcy cases. Section 344 of the Bankruptcy Code provides: "Immunity 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."[25] Additionally, § 727(a)(6)(B) and (C), which relate to denial of a discharge, each expressly contemplate a debtor who has invoked the "privilege against self-incrimination."[26] Thus, the bankruptcy code contemplates that individuals therefore may "plead the fifth" in bankruptcy cases and in adversary proceedings.[27]

C. Invocation of the Fifth Amendment may create an adverse inference in civil cases such as bankruptcy cases.

A court is entitled to draw inferences from a witness's refusal to testify under the Fifth Amendment.[28] A court has discretion whether to draw an adverse

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22 *Id*. at 864.
23 *Id*. at 867.
24 *Id*. (quoting *Argomaniz*, 925 F.2d at 1353).
25 11 U.S.C. § 344.
26 11 U.S.C. § 727(a)(6)(B), (C).
27 McCormick v. Bank One Leasing Corp., 49 F. 3d 1524, 1526 (11th Cir. 1995) (citing McCarthy v. Arndstein, 266 U.S. 34, 35 (1924)).
28 Baxter v. Palmigiano, 425 U.S. 308, 319–20 (1976); *see also In re* Salzman, 61 B.R. 878, 890 (Bankr. S.D.N.Y. 1986) ("Moreover, when a debtor refuses to testify in response to probative evidence offered against him in support of a complaint to determine dischargeability of a creditor's claim, it is

inference from an individual's assertion of the privilege against self-incrimination.[29] Importantly, however, at summary judgment, a court's adverse inference drawn from a party invoking the privilege against self-incrimination "may not be the sole basis for a finding of liability."[30]

An adverse inference may yield dismissal in the context of a bankruptcy case.[31] As one court notes, "[a] debtor seeking relief from his debt obligations by filing a petition under the Bankruptcy Code does so willingly and voluntarily and is not entitled to as much consideration in being compelled to testify as would be another witness who has no interest in the proceeding."[32] The Bankruptcy Court for the Western District of Pennsylvania noted, "[d]ismissal of a bankruptcy case without discharge is appropriate where a Fifth Amendment privilege is invoked, even if properly asserted, when the exercise of the privilege precludes a trustee's fair and effective administration of the bankruptcy estate."[33]

For example, the Bankruptcy Court for the Southern District of Indiana, in *In re Wisler*, found that the debtors "put their assets, liabilities, income and

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proper for the Bankruptcy Court to draw adverse inferences from his invocation against self-incrimination.").

[29] Citizens Bank v. Marrama (*In re* Marrama), 331 B.R. 10, 16 (D. Mass. 2005) ("[A] bankruptcy court may draw a negative inference from the invocation of the Fifth Amendment privilege.") (citing *In re* Carp, 340 F.3d 15, 23 (1st Cir. 2003); *In re* Santaella, 298 B.R. 793, 813 (Bankr. S.D. Fla. 2002).

[30] City of Atl. City v. Drummon (*In re* Drummon), Case No. 19-10670 (JLG), Adv. No. 19-01211 (JLG), 2023 Bankr. LEXIS 2855, at *72 (Bankr. S.D.N.Y. Nov. 30, 2023) (quoting *In re* Jacobs, 394 B.R. 646, 663 (Bankr. E.D.N.Y. 2008)). *See also* United States v. White, 589 F.2d 1283, 1287 (5th Cir. 1979).

[31] *See In re* Brandenburg, Case No. 06-30709, 2007 Bankr. LEXIS 230, at *12 (Bankr. E.D. Tenn. Jan. 10, 2007) (quoting *In re* Wisler, No. 00-5546-FJO-13, 2000 Bankr. LEXIS 1971, at *8 (Bankr. S.D. Ind. Nov. 30, 2000) ("The Debtors' refusal to provide information, even under the assertion of the Fifth Amendment, is grounds for the dismissal of this bankruptcy proceeding.")).

[32] *Ciotti*, 442 B.R. at 415 (citing Scarfia v. Holiday Bank, 129 B.R. 671, 675 (M.D. Fla. 1980)).

[33] *Id.* at 415 (citing *In re* Moses, 792 F. Supp. 529 (E.D. Mich. 1992)).

expenses at issue" by voluntarily instituting a bankruptcy case.[34] There, the court explained that although the debtors had the right to assert the privilege against self-incrimination, because "the [d]ebtors chose to participate in the bankruptcy proceeding[,]" creditors had the right to inquire into the matters of the debtors' estate.[35] The court dismissed the case, stating: "The [d]ebtors [sic] refusal to provide information, even under assertion of the Fifth Amendment, is grounds for the dismissal of this bankruptcy proceeding."[36]

On the other hand, invoking the privilege against self-incrimination should not result in a severe penalty.[37] That "penalty" is not limited to fines or imprisonment, but has been extended to include any sanction deemed "costly."[38] Thus, a court's dismissal should be "to balance the invocation of the privilege against the need for adequate disclosure to the trustee and creditors," and should not be punitive.[39]

In *Knedlik v. Spark Networks Ltd. (In re Knedlik)*, the court was compelled to weigh a person's rights to assert the Fifth Amendment with her rights under the Bankruptcy Code.[40] An eighty-four-year-old mother filed four consecutive involuntary bankruptcy cases against her son after the son was barred from filing

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34 2000 Bankr. LEXIS 1971, at *8.
35 *Id*.
36 *Id*.
37 Spevack v. Klein, 385 U.S. 511, 515–16 (1967).
38 *Id*. at 515.
39 *Ciotti*, 442 B.R. at 416 (citing *Moses*, 792 F. Supp. at 538).
40 BAP No. WW-08-1011-KuKJu, 2008 Bankr. LEXIS 4670, at *12 (B.A.P. 9th Cir. June 30, 2008).

on his own behalf.[41] The bankruptcy court issued an order requiring the mother-creditor and son to appear and show cause why the involuntary petition was not an abusive filing.[42] At the show cause hearing, the mother-creditor invoked the privilege against self-incrimination.[43] After the bankruptcy court dismissed the case *sua sponte*, the mother-creditor argued on appeal that her due process rights were violated because she had to "choose between testifying in support of the involuntary petition and self-incrimination."[44] The Bankruptcy Appellate Panel found that the bankruptcy court's dismissal was not a penalty for the mother-creditor's invocation of her privilege under the Fifth Amendment.[45] Rather, the court explained that, although an individual has the constitutional right to assert the Fifth Amendment (a privilege which was honored in this case), a person "does not have a constitutional right to receive relief under the bankruptcy laws."[46] Therefore, even if a debtor's invoking her Fifth Amendment rights results in the dismissal of the case, "the debtor is not being required to 'forfeit one constitutionally protected right as the price of exercising another."[47] Further, the Bankruptcy Appellate Panel noted she "submitted to the jurisdiction of the bankruptcy court" by filing the involuntary petition against her son.[48]

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41 *Id*. at *4–6.
42 *Id*. at *12.
43 *Id*. at *22.
44 *Id*.
45 *Id*. at *24.
46 *Id*. at *23.
47 *Id*. at *23–24 (citing Lefkowitz v. Cunningham, 431 U.S. 801 (1977)).
48 *Id*.

D. The Fifth Amendment privilege may be waived through testimony or conduct.

The privilege against self-incrimination may be waived if not invoked.[49] "Once a witness voluntarily reveals incriminating facts, that individual may not invoke the privilege to avoid disclosing the details of those facts . . . . Thus, the witness must disclose those details which are relevant to the incriminating facts previously revealed."[50] Accordingly, a witness under examination should invoke the privilege against self-incrimination as early as possible.[51]

A debtor may also lose the privilege through filed pleadings.[52] In *Friedman*, the bank filed an action against the debtor under §§ 523 and 727.[53] The debtor filed an answer to the complaint that admitted certain factual allegations and made other statements.[54] Accordingly, the Bankruptcy Court for the Northern District of Illinois held that 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."[55] The court required the debtor to answer discovery requests despite his attempted assertion of the privilege.[56]

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49 Teitleman v. Dale Petroleum (*In re* A&L Oil Co.), 200 B.R. 21, 24 (D.N.J. 1996) (*citing* Garner v. United States, 424 U.S. 648, 653 (1979)).
50 *Id.* at 24.
51 *Teitleman*, 200 B.R. at 24.
52 Am. Eagle Bank v. Friedman (*In re* Friedman), 543 B.R. 833, 842 (Bankr. N.D. Ill. 2015).
53 *Id.* at 836.
54 *Id.*
55 *Id.* at 843
56 *Id.* at 842.

E. The Fifth Amendment privilege extends to production of documents

Because documents may be just as incriminating as oral testimony, the Fifth Amendment protects individuals from being compelled to produce self-incriminating documents.[57] The scope of the privilege is not limited to the contents of documents themselves; rather, the privilege extends to the very act of producing documents in certain circumstances.[58]

1. Act of Production Doctrine

Producing documents or evidence may constitute statements of fact as to: (1) the existence of documents; (2) the authenticity of documents; and (3) possession and control of documents.[59] This concept is known as the Act of Production Doctrine.[60] The Act of Production Doctrine rests on the rationale that "producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced."[61] When an individual complies with a subpoena, they are "tacitly conced[ing]" the existence of the papers requested, as well as conceding that such papers are in their control or possession.[62]

An important clarification: the Act of Production Doctrine does not mean that the contents of documents themselves are privileged under the Fifth Amendment.[63] "The Fifth Amendment provides absolutely no protection for the contents of private

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57 Fisher v. United States, 425 U.S. 391, 410 (1976).
58 United States v. Hubbell, 530 U.S. 27, 36–37 (2000).
59 *Id.* at 36 (quoting United States v. Doe, 465 U.S. 605, 613 (1984).
60 *Id.*
61 *Fisher*, 425 U.S. at 410.
62 *Id*.
63 *See Fisher*, 425 U.S. at 410-11; *Hubbell*, 530 U.S. at 40–41.

papers of any kind."[64] "The protection of the Fifth Amendment does not extend to the contents of a voluntarily created document…. The Supreme Court has consistently held that when a person has voluntarily created a document, they may be compelled to produce the document even though it may contain incriminating information…."[65] Again, it is the act of producing the document or thing that may be incriminatory and can be protected by the Fifth Amendment in certain situations.[66]

There exist several exceptions to the Act of Production Doctrine. These exceptions were analyzed by the Bankruptcy Court for the Western District of Texas in *In re HJH Consulting Group, Inc.*[67]

In *HJH Consulting*, the debtors asserted (and scheduled) claims against a former executive of the debtors, which claims included fraud and breach of fiduciary duty.[68] The debtors scheduled the value of these claims as unknown.[69] Specifically, the debtors alleged that:

> ….[former executive] manipulated Debtors' accounting records by overstating the amounts in (or existence of) certain accounts receivable. [Former executive] denies the veracity of the accusations. [Former executive] and other parties are under

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64 *Doe*, 465 U.S. at 611–13 (1984) (O'Connor, concurring). *See also* Baltimore City Dep't. of Social Servs. v. Bouknight, 493 U.S. 549, 555 (1990) (O'Connor, J.) ("a person may not claim the [Fifth] Amendment's protection based upon incrimination that may result from the contents or nature of the thing demanded.").

65 *In re* Welsh, Case No. 13-02457-8-SWH, 2013 Bankr. LEXIS 4716, at *13 (Bankr. E.D.N.C. 2013) (Humrickhouse, J.) (citing *Hubbell*, 530 U.S. at 35–36).

66 *See In re* Hyde, 235 B.R. 539 (S.D.N.Y. 1999) (District court reversed bankruptcy court because production of the documents would be a necessary link to any incriminating evidence contained in the documents and production would implicitly authenticate the documents).

67 No. 18-50788-RBK, 2018 Bankr. LEXIS 2579 (Bankr. W.D. Tex. Aug. 24, 2018) (King, J.).

68 *In re* HJH Consulting Grp., Inc., No. 18-50788-RBK, 2018 Bankr. LEXIS 2579, at *2-3 (Bankr. W.D. Tex. Aug. 24, 2018).

69 *Id*.

> criminal investigation for related allegations, and he has retained criminal defense counsel.[70]

The debtors sought to compel the former executive to produce documents under Rule 2004. The court analyzed the Act of Production Doctrine. The court tracked the legal development of the doctrine to a 1974 Supreme Court decision:

> Compelled document production has the potential to be precisely as incriminating as compelled oral testimony. *See Bellis v. United States*, 417 U.S. 85, 87, 94 S. Ct. 2179, 40 L. Ed. 2d 678 (1974) ("It has long been established, of course, that the Fifth Amendment privilege against compulsory self-incrimination protects an individual from compelled production of his personal papers and effects as well as compelled oral testimony.")….[71]
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> This ruling was developed further in *United States v. Hubbell*, 530 U.S. 27, 120 S. Ct. 2037, 147 L. Ed. 2d 24 (2000), where the Supreme Court held that the act of production itself may implicitly communicate statements of fact, such as the existence of documents, the defendant's possession and control of the documents, and the documents' authenticity. *Id.* at 36. This is referred to as the Act of Production Doctrine. *Farmer*, 560 F. App'x. at 326.[72]

The court considered two exceptions to the Act of Production Doctrine: the Foregone Conclusion Doctrine and the Required Records Doctrine. The Foregone Conclusion Doctrine applies, and the privilege does not "…apply where the existence and location of documents is a 'foregone conclusion,'" such as when certain documents are already known to exist through means other than the target of an investigation.[73] The Required Records Doctrine, on the other hand, requires that

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70 *Id.*

71 *Id.* at *9.

72 *Id.*

73 *Id.* at *10–13 ("For example, where the IRS knows an accountant prepared documents and delivered them, but is not requesting that the taxpayer authenticate or verify them, the risk of self-

the inquiry be regulatory, that the records must be of a kind customarily kept, and that the records have assumed "'public aspects' which render them at least analogous to public documents."[74] Ultimately, the court blocked the debtors' subpoena efforts with respect to most of the documents requested from the former executive, but held that his tax returns and W-2 forms were "required public records" and required their production.[75]

One court recently considered the exceptions to the Act of Production Doctrine in the context of an individual chapter 11 case.[76] In *In re Kwok*, the court appointed a trustee in the debtor's individual chapter 11 case.[77] The trustee sought production of documents from the debtor under Bankruptcy Rule 2004.[78]

The debtor was under criminal investigation and was arrested during the pendency of his chapter 11 case.[79] After the court entered an order compelling production, the debtor sought relief from that order under the Act of Production Doctrine.[80] The court explained that under Supreme Court precedent, a court

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incrimination is almost nonexistent, absent additional facts. The existence was already known, and the authenticity is verified through the accountant who created the document instead of through the taxpayer defendant.").

74 *Id.* at *11–12.

75 *Id.* at *19. The court's ruling in HJH included the following: "[Former executive] properly invoked his privilege, but may be compelled to produce documents that fall into exceptions to the Act of Production Doctrine. Those documents are few. [Former executive] may not be compelled to produce his communications, bank account balances and information, or alleged written admissions of guilt (perhaps the starkest example of the testimonial nature document production can display and plainly not a document [former executive] may be compelled to produce, regardless of whether it exists). [Former executive] may be compelled to produce recent tax records and W-2 forms." *Id.* at *19-*20.

76 *In re* Kwok, 653 B.R. 480, 492 (D. Conn. 2023).

77 *Id.* at 487.

78 *Id.*

79 *Id.* at 486–87.

80 *Id.* at 487.

should analyze whether the act of production involves tacit averments which are both testimonial and incriminating.[81] The court looked to its circuit precedent to determine if the tacit averments were testimonial, and evaluated (1) whether the existence and location of the subpoenaed papers were unknown to the government, and (2) whether production implicitly authenticated the documents.[82] The bankruptcy court recognized that the Act of Production Doctrine applied to subpoenaed documents.[83] But, the trustee argued that an exception, the Required Records Doctrine, should apply to the Act of Production Doctrine and the debtor should nonetheless be required to produce the requested documents.[84]

The court cited the Supreme Court regarding the Required Records Doctrine: "The Fifth Amendment privilege may not be invoked to resist compliance with a regulatory regime constructed to effect the state's public purposes unrelated to the enforcement of its criminal laws."[85] The court then noted that the debtor was obligated to produce documents under § 521(a)(3) and (a)(4), which it considered part of a regulatory scheme.[86] Therefore, the documents requested were "required records."[87] The court held the debtor in contempt but allowed him an opportunity to purge himself of the contempt by producing the documents.[88]

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81 *Id*. at 492 (citing Fisher v. United States, 425 U.S. 391, 410–11 (1976)).
82 *Id*. (citing United States v. Doe (*In re* Grand Jury Subpoena), 1 F.3d 87, 93 (2d Cir. 1993)).
83 *Id*.
84 *Id*.
85 *Id*. at 498 (citing Baltimore City Dep't of Social Services v. Bouknight, 493 U.S. 549, 556).
86 *Id*.
87 *Id*.
88 *Id*.

2. *Collective Entity Doctrine*

The privilege against self-incrimination is available only to individuals and may not be raised by an entity.[89] However, under the Collective Entity Doctrine, an individual custodian of corporate records may be compelled to produce documents of the entity which the individual has in their custody.[90] Where an individual participates in a corporate entity, the right to withhold production of the entity's documents does not exist.[91]

The individual subject to the inquiry must produce the entity's documents but cannot be forced to condemn himself through oral testimony.[92] The United States District Court for the Southern District of New York applied the Collective Entity Doctrine in *In re Kossoff, PLLC*.[93] There, several creditors filed an involuntary bankruptcy petition against a single-member limited liability company.[94] When the Chapter 7 trustee sought to compel the sole-owner to produce the debtor's records, the owner asserted his Fifth Amendment privilege against self-incrimination.[95] Because the debtor was a single-member PLLC, the owner argued the debtor was akin to a sole proprietorship and he should be able to invoke the Fifth Amendment privilege.[96] The bankruptcy court held that the Collective Entity

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89 Kossoff PLLC v. Togut (*In re* Kossoff, PLLC), 2021 U.S. Dist. LEXIS 189366, at *2–3 (S.D.N.Y. Sep. 30, 2021).
90 *Id.* at *4–5 (*citing* Braswell v. United States, 487 U.S. 99, 108 (1988)).
91 *Id.*
92 *Id.*
93 *Id.*
94 *Id.* at *1–2.
95 *Id.*
96 *Id.* at *5.

Doctrine rendered the Fifth Amendment privilege inapplicable to the documents and entered an order compelling production.[97]

On appeal, the district court affirmed, holding that the privilege against self-incrimination does not apply to corporate custodians, because they do not hold corporate documents in their individual capacities.[98] The district court noted that unlike the owner's production of records, the owner's oral testimony is not a corporate action.[99] Thus, any privilege the owner wished to assert regarding his testimony must be made on a question-by-question basis.[100] Based on these findings, the district court affirmed the bankruptcy court and held that the owner should be compelled to produce the documents in his possession as the designated corporate representative.[101]

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97 *Id.* at *2–3.
98 *Id.*
99 *Id.*
100 *Id.*
101 *Id.*

III. Implications of Criminal Prosecution on Bankruptcy

Bankruptcy court is often compared to a fishbowl.[102] Generally, full disclosure of all relevant information is required.[103] Indeed, at least one court notes: "A bankruptcy case is not like most other types of civil litigation[.]"[104] Because a debtor usually chooses to institute a bankruptcy case, the debtor invokes "various protections" separate from the Fifth Amendment privilege against self-incrimination.[105] In filing their case, a debtor receives relief, at least temporarily, from creditors seeking to execute or obtain judgments on property and assets of the debtor.[106] To receive such relief, a debtor must disclose all assets as well as certain transactions so that the estate may be administered.[107] When a debtor invokes the constitutional right to refuse to testify, "the bankruptcy court's ability to effect a thorough and equitable adjudication is jeopardized."[108]

A. The Automatic Stay (11 U.S.C. § 362(b)(1))

Generally, the automatic stay freezes all actions that attempt to collect a debt from a debtor as described and listed in § 362(a). However, § 362(b) excepts the "commencement or continuation of a criminal action or proceeding" from the automatic stay.[109]

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102 *In re* Highland Capital Mgmt., L.P., No. 19-34054-sgj-11, 2023 Bankr. LEXIS 2104, at *92 (Bankr. N.D. Tex. Aug. 25, 2023) ("Bankruptcy practitioners and judges sometimes call bankruptcy a fishbowl or use the 'open kimono' metaphor for good reason. It is generally a very open process.").

103 *See* 11 U.S.C. § 521.

104 United States Tr. v. Gregg (*In re* Gregg), 510 B.R. 614, 625 (Bankr. W.D. Mo. 2014).

105 *Id*. at 625-26.

106 *Id*. at 626.

107 *See id.*

108 *In re* Connelly, 59 B.R. 421, 30 (Bankr. N.D. Ill. 1986) (citations omitted).

109 *In re* Burgess, 503 B.R. 154, 156 (Bankr. M.D. Fla. 2014).

As to criminal prosecutions, the exclusion of criminal proceedings is consistent with "the policy of making bankruptcy a means of offering relief to financially pressed debtors and not as providing a shelter from the consequences of criminal acts."[110] This exception applies equally to state and federal criminal actions.[111]

While the plain language of § 362(b)(1) fails to limit its application to government proceedings, Collier on Bankruptcy notes, "it seems clear that this [limitation] is what is intended."[112] Contempt proceedings fall into the § 362(b)(1) exception if the contempt is criminal in nature.[113] Although the Bankruptcy Code fails to define "criminal action," several courts agree that a contempt order entered in a civil action may constitute a "criminal action" or "criminal proceeding" exempt from the automatic stay.[114]

The Bankruptcy Court for the Middle District of Florida, in *In re Burgess*, explained: "if the purpose of the state court order is intended to uphold the court's

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110 3 Collier on Bankruptcy ¶ 362.05[1] (16th 2023).

111 *Id*.

112 *Id*.

113 SEC v. Bilzerian, 131 F. Supp. 2d 10, 12 (D.D.C. 2001) ("Only contempt orders to uphold the dignity of the court are excepted from the automatic stay" (quoting NLRB v. Sawulaki, 158 B.R. 971, 975 (E.D. Mich. 1993)).

114 *Id*.; *see also* Stovall v. Stovall, 126 B.R. 814, 815 (N.D. Ga. 1990) ("[S]everal courts have drawn a distinction between contempt proceedings intended to effectuate collection of a judgment and those intended to 'uphold the dignity of the court.'"); Kukui Gardens Corp. v. Holco Capital Grp., Inc., 675 F. Supp. 2d 1016, 1026 (D. Haw. 2009); Rook v. Rook (*In re* Rook), 102 B.R. 490, 494(Bankr. E.D. Va. 1989) ("We note that although an order which issues from a civil proceeding presumably may be civil in nature, a court may determine upon closer scrutiny that the proceeding and thus the order were in fact punitive."); Tshianai v. Monahan (*In re* Tshiani), Case No. 14-14920PM, Adv. No. 14-0459PM, 2014 Bankr. LEXIS 4552, at *4 (Bankr. Dist. Md. Oct. 30, 2014).

dignity, then the order is criminal in nature."[115] In contrast, "[a] contempt order that allows the debtor to purge himself of contempt . . . is civil in nature," and thus subject to the automatic stay.[116]

Creditors have been found to have violated the automatic stay where they refused to withdraw or quash a pre-petition arrest warrant issued with respect to a pre-petition collection action.[117] Under these circumstances, not only the creditor, but also creditor's attorney, may be liable for the stay violation for refusing to quash the arrest warrant.[118]

In limited circumstances, some courts have found criminal proceedings subject to the automatic stay. Despite the plain reading of § 362(b)(1), which excepts criminal actions from the scope of the automatic stay, courts disagree about application of the automatic stay where the alleged criminal act gives rise to the debt in question.[119] For instance, compare the Bankruptcy Court for the Middle District of Georgia's holding in *Smith v. Goode (In re Smith) (Smith II)*[120] with the

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115 *Burgess*, 503 B.R. at 158; *see* Walker v. Gwynn (*In re* Walker), 157 Fed. Appx. 171, 172–73 (11th Cir. 2005) ("The enforcement of a criminal judgment against a debtor in a restitution hearing does not violate the automatic stay[.]").

116 Goodman v. Albany Realty Co. (*In re* Goodman), 277 B.R. 839, 841 (Bankr. M.D. Ga. 2001) (Walker, J.) (citing *In re* Maloney, 204 B.R. 671, 674 (Bankr. E.D.N.Y. 1996)).

117 *See In re* Daniels, 316 B.R. 342, 350 (Bankr. D. Idaho 2004).

118 *Id*. at 350–51 ("Counsel also bears personal responsibility for stay violations under the facts in this case. Based upon the evidence, it was clear to the Court that but for Counsel's advice, Creditor may have pursued an alternative path.").

119 *See* Dorsey v. Prokos Check Cashing (*In re* Dorsey), 373 B.R. 528, 531 (Bankr. N.D. Ohio 2007) ("[T]he application of this provision is not necessarily so straightforward when the alleged criminal act is the very same act that gives rise to the debt."); *contra*. *In re* Bibbs, 282 B.R. 876, 880 (Bankr. E.D. Ark. 2002); Gruntz v. County of Los Angeles (*In re* Gruntz), 202 F.3d 1074, 1085 (9th Cir. 2000) (finding criminal prosecution's exclusion from automatic stay provides no exception for examining prosecutorial purpose or bad faith).

120 Smith v. Goode (*In re* Smith) (*Smith II*), 301 B.R. 96, 100 (Bankr. M.D. Ga. Oct. 24, 2003) (Walker, J.).

holding of the Bankruptcy Court for the Northern District of Ohio in *Dorsey v. Prokos Check Cashing (In re Dorsey).*[121]

In *Smith II*, the court found that a post-petition criminal prosecution and incarceration for fraudulently obtaining unemployment benefits did not violate the automatic stay.[122] The debtor claimed the defendants pursued criminal prosecution to frustrate the automatic stay.[123] In its analysis, the court noted § 362(b)(1) had been broadly interpreted to include all criminal proceedings, regardless of their purpose.[124] Because the prosecution was a criminal proceeding, the court found that the criminal proceeding did not violate the automatic stay.[125]

Other courts consider the primary motivation of the creditor with respect to the criminal matter.[126] In *Dorsey*, the court found that the creditor did not violate the automatic stay by registering a post-petition criminal complaint for passing a bad check.[127] The court noted that the application of § 362(b)(1) is less clear when the alleged criminal act also gives rise to the debt.[128] The court determined that the creditor's motivation for bringing the action is relevant.[129] This "mixed motive test"

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121 Dorsey v. Prokos Check Cashing (*In re* Dorsey), 373 B.R. 528, 532 (Bankr. N.D. Ohio 2007).
122 *Smith II*, 301 B.R. at 100.
123 *Id.*
124 *Id.* (citing *Gruntz*, 202 F.3d at 1087; *but see* Sheppard v. Piggly Wiggly (*In re* Sheppard), No. 99-41085-JTL, 2000 Bankr. LEXIS 2004, at *2 (Bankr. M.D. Ga. January 6, 2000) (Laney, J.)). Courts have promulgated a variety of different tests to determine whether prosecution of a debtor is an effort to collect a debt or for some other legitimate purpose. Three such tests are: (1) the bad faith test; (2) the irreparable harm test; and (3) the principal motivation test. *See In re* Brinkman, 123 B.R. 318 (Bankr. D. Minn. 1991); *see also* Evans v. Bank of Eureka Springs (*In re* Evans), 245 B.R. 852 (Bankr. W.D. Ark. 2000).
125 *Smith II,* 301 B.R. at 100–01.
126 *Dorsey*, 373 B.R. at 531–32.
127 *Id.* at 530.
128 *Id.* at 531.
129 *Id.* at 532.

concerns the creditor's primary motivation for bringing the criminal action.[130] The debtor bears the burden of establishing that the creditor's primary motivation is to collect its debt and the court noted that only in the most egregious circumstances will the debtor be able to show sufficient evidence.[131] The debtor presented little evidence to support his claim.[132] The court held that the debtor's contentions alone did not establish the creditor's primary motivation to collect a debt.[133] Thus, the post-petition criminal proceeding did not violate the automatic stay.[134]

B. Adversary Proceedings

Courts have discretionary power to stay civil proceedings, postpone civil discovery, or impose other protective orders or requirements to further the interests of justice.[135] "Courts may stay a civil case to preserve a witness's Fifth Amendment Privilege rights."[136] A stay of a civil proceeding pending the outcome of a criminal proceeding is not constitutionally required, but may be granted when special circumstances so require in the interests of justice.[137]

The existence of a parallel criminal proceeding by itself does not constitute a special circumstance under which the court is required to stay an adversary proceeding.[138] Instead, to warrant staying an adversary proceeding, a court must find that the invocation of the Fifth Amendment will result in "certain loss by

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130 *Id.*
131 *Id.*
132 *Id.* at 532–33.
133 *Id.* at 533.
134 *Id.*
135 Palolian v. Byline Bank (*In re* Kowalski), 633 B.R. 822, 827 (Bankr. N.D. Ill. 2021).
136 *Id.*
137 United States v. Kordel, 397 U.S. 1, 12 (1970).
138 McDermott v. Kelter (*In re* Kelter), 587 B.R. 187, 194 (Bankr. N.D. Ga. 2018) (Baisier, J.).

automatic summary judgment."[139] Further, staying an adversary proceeding is unwarranted where: (1) a judgment must be supported by sufficient evidence proffered by the plaintiff; (2) the defendant's silence is in and of itself insufficient to support any such judgment; (3) the defendant will not in consequence of his silence be automatically found liable for the conduct complained of; and (4) the defendant's refusal to waive the Fifth Amendment privilege and submit to interrogation will not, standing alone and without regard to the other evidence, result in a judgment being rendered against him.[140]

The Bankruptcy Court for the Northern District of Alabama applied these standards in *Gradco Corp. v. Blankenship.*[141] There, the debtor-defendant moved to stay an adversary proceeding while a parallel criminal proceeding involving the same circumstances and activities was litigated.[142] The debtor-defendant argued that he risked losing the adversary proceeding and having a judgment entered against him if he: (1) invoked his Fifth Amendment privilege against self-incrimination; (2) refused to testify; or (3) provided information that may be used against him in his criminal trial.[143]

The court denied the debtor-defendant's request to stay the adversary proceeding for the following reasons: (1) the defendant had made a blanket

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139 *Id.* (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)).

140 Gradco Corp. v. Blankenship (*In re* Blankenship), 408 B.R. 854, 858–59 (Bankr. N.D. Ala. 2009) ("In other words, a stay is generally not warranted unless the claimant's, 'refusal to waive the fifth amendment privilege, standing alone and without regard to other evidence,' will result in an adverse judgment being entered against him.")(citation omitted).

141 In re *Blankenship*, 408 B.R. 854, 858.

142 *Id*.

143 *Id*.

assertion of the Fifth Amendment privilege which is "an inadequate basis for the issuance of a stay;" (2) the case was not in a procedural posture for a judgment to be entered against the debtor-defendant and therefore, "[t]he defendant's invocation of his Fifth Amendment privilege in this proceeding will not compel the entry of a judgment of nondischargeability against him;" (3) the defendant failed to show that "invocation of his Fifth Amendment privilege against self-incrimination will, standing alone and without regard to other evidence, automatically require that a judgment of nondischargeability be entered against him;" (4) the defendant failed to show "sufficient justification for delaying the prompt resolution of this case and did not show that failure to stay the present proceeding will impermissibly burden the exercise of his constitutional rights;" and (5) there were no special circumstances in this case that would require a stay of the civil proceeding in the interests of justice.[144]

Similarly, in *McDermott*, the Bankruptcy Court for the Northern District of Georgia found that granting a stay of the adversary proceeding was not warranted.[145] Even if the debtor did not testify regarding the complaint, the trustee still had the burden to prove all of the elements of the § 727 claim.[146] The court noted that debtors rarely admit their fraudulent intent and trustees usually rely on other forms of evidence to prove this element.[147] As such, denial of the stay and invocation of the privilege would not compel the entry of judgment against the

144 *Id.* at 858-61.
145 McDermott v. Kelter (*In re* Kelter), 587 B.R. 187, 194 (Bankr. N.D. Ga. 2018).
146 *Id.* at 192.
147 *Id.* at 194 & n.13.

debtor on the complaint and would, therefore, not warrant granting the stay of the adversary proceeding.[148]

Outside of the Eleventh Circuit, at least one bankruptcy court applied a six-factor test to determine whether it should use its inherent authority under § 105(a) to stay an adversary proceeding where a criminal complaint was drawn against a defendant during the pendency of an adversary proceeding.[149] To determine whether it should stay the ongoing adversary proceeding, the court evaluated: (1) whether the civil and criminal cases shared the same subject matter; (2) whether both actions were brought by the government; (3) the posture of the criminal proceeding; (4) the public's interest in entry of a stay; (5) the plaintiff's interests in expedient litigation and the potential prejudice of a delay; and (6) the burden that any aspect of the proceedings may impose on the defendant.[150]

C. Enjoining Criminal Proceedings

Though a criminal prosecution is not stayed upon the filing of the bankruptcy petition, under § 105(a) a bankruptcy court may enjoin a criminal prosecution in extraordinary circumstances.[151] To determine whether extraordinary circumstances exist, the Eleventh Circuit established a two-prong test.[152] The debtor must prove that: (1) there exists a threat of great and immediate injury; and

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148 *Id.* at 194.

149 *See* Palolian v. Byline Bank (*In re* Kowalski), 633 B.R. 822, 827 (Bankr. N.D. Ill. 2021).

150 *Id.* at 827 (citing Layng v. Garcia (*In re* Garcia), 569 B.R. 480, 487 (Bankr. N.D. Ill. 2017)).

151 *Smith II*, 301 B.R. at 100; 11 U.S.C. § 105(a) ("The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.").

152 *Id.* (citing Barnette v. Evans, 673 F.2d 1250, 1252 (11th Cir. 1982) (citing Younger v. Harris, 401 U.S. 37, 46 (1971))).

(2) the injunction is necessary to preserve a federally protected right.[153] To prove a threat of great and immediate injury, the debtor must establish the criminal case was filed in bad faith.[154] To demonstrate the necessity of an injunction to protect a federal right, the debtor must show an inability to raise a defense in the criminal proceeding based on the allegation of bad faith.[155]

Bare allegations of bad faith in bringing the criminal prosecution do not support enjoining the criminal proceeding. In *Smith II*, discussed *supra*, the court found that the debtor failed to show either the inability to raise a defense in support of his federal right or the threat of great and immediate injury.[156] The debtor claimed the defendants, who were also the complaining witnesses of the criminal prosecution, pursued such criminal prosecution solely to collect a debt.[157] The debtor presented evidence showing that the complaining witness-defendant did not initiate the criminal proceeding until the debtor stopped repaying the debt.[158]

In its analysis, the court explained that though bad faith or "subversion of the criminal process to collect debt" may be considered, the intentions of complaining witnesses are not dispositive as to a finding of bad faith of a criminal prosecution.[159] The court noted that the district attorney's discretion, and not the whims of the complaining witnesses, determines whether a criminal case will

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153 *Id.*

154 Smith v. Goode (*In re* Smith) (*Smith I*), 299 B.R. 669, 675–76 (Bankr. M.D. Ga. June 12, 2003) (Walker, J.).

155 *Smith I*, 299 B.R. at 676.

156 Smith v. Goode (*In re* Smith) (*Smith II)*, 301 B.R. 96, 102–03 (Bankr. M.D. Ga. 2003) (Walker, J.)

157 *Id.* at 102.

158 *Id.*

159 *Smith I*, 299 B.R. at 674.

proceed.[160] The debtor did not present any evidence questioning whether the district attorney exercised independent judgment in continuing the prosecution or that the district attorney colluded with the complaining witnesses.[161] Thus, no evidence existed indicating bad faith in bringing the criminal case.[162]

The court noted that even if the debtor could prove bad faith, the debtor presented no evidence of his inability to raise bad faith as a defense in the criminal proceeding.[163] The court held that the debtor failed to show either the inability to raise a defense in support of his federal right or the threat of great and immediate injury and was, therefore, unable to enjoin the debtor's state court criminal proceeding.[164]

1. *Driver's License Suspensions*

Filing a bankruptcy petition may lead to recovery of a debtor's revoked driver's license.[165] Unlike bankruptcy proceedings, which arise exclusively under federal law, in general, state statutes govern driving privileges. A state cannot suspend an individual's driver's license based solely on that individual's status as a

160 *Id.*
161 *Id.*
162 *Id.*
163 *Id.*
164 *Id.*
165 Stephens v. State Farm Ins. Co. (*In re* Stephens), Case No. 16-10775-WHD, 2016 Bankr. LEXIS 3061, at *3 (Bankr. N.D. Ga. July 18, 2016) (Drake, J.); *In re* Fletcher, Case No. 06-11814, 2007 Bankr. LEXIS 4718, at *2–3 (Bankr. N.D. Ga. Mar. 13, 2007) (Drake, J.).

debtor.[166] Further, a driver's license is a privilege—not property of the bankruptcy estate.[167]

Recovery or withholding of a debtor's driver's license generally depends on the purpose of the statute under which the driver's license was suspended. If driving privileges are suspended under a statute designed to collect a debt, then a court will usually reinstate the debtor's driver's license.[168] On the other hand, if the relevant statute is intended to promote public safety and welfare, the license suspension will be considered an exception to the automatic stay, and will remain in effect.[169] Nevertheless, in these instances, a court still may entertain a debtor's request to have his license reinstated, provided the debtor demonstrates need for reinstatement and proposes payment of the subject obligation in his plan.[170]

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166 Frazier v. State of Georgia (*In re* Frazier*)*, Case No. 02-41136, Adv. No. 02-4133, 2003 Bankr. LEXIS 1458, at *26–27 (Bankr. S.D. Ga. June 11, 2003) (Davis, J.) (citing 11 U.S.C. § 525).

167 *See* Kimsey v. Suskie (*In re* Kimsey), 263 B.R. 244, 246 (Bankr. E.D. Ark. 2001) (citing Geiger v. Commonwealth of Penn. (*In re* Geiger) 143 B.R. 30 (E.D. Pa. 1992), *aff'd* 993 F.2d 224 (3d Cir. 1993)).

168 Burbano v. Grange Mutual Ins., Co. (*In re* Burbano*)*, Case No. 16-68396-PMB, 2017 Bankr. LEXIS 737, at *10–12, (Bankr. N.D. Ga. Mar. 20, 2017) (Baisier, J.) (finding that license suspension under O.C.G.A. §§ 40-9-60 *et seq.* violates the automatic stay because the purpose of the state statute is to assist in the recovery of claims by judgment creditors); *see also Stephens*,2016 Bankr. LEXIS 3061, at *2 (finding stay violation and requiring debtor to "satisfy any requirements relating to the reinstatement of his license that are not related to the repayment of the judgment.").

169 *In re* Frazier, 2003 Bankr. LEXIS 1458 (holding that license suspension was excepted from automatic stay under § 362(b)(4)); *see also* Talley v. Ala. Dep't of Pub. Safety (*In re* Talley), 347 B.R. 906, 908 (Bankr. N.D. Ala. 2006), *aff'd* Talley v. Ala. Dep't of Pub. Safety, 472 F. Supp. 2d 1323 (N.D. Ala. 2007) ("[R]evocation of the Plaintiff's driver's license for failure to pay fines was the continuation of a criminal proceeding and was not prohibited by the automatic stay" in accordance with § 362(b)(1)).

170 Kelly v. Child Support Servs. (*In re* Kelly), Case. No. 08-5727-MHM, 2009 Bankr. LEXIS 902, at *2 (Bankr. N.D. Ga. Mar. 25, 2009) (Murphy, J.) ("Under 11 U.S.C. §105(a), the bankruptcy court has authority to enjoin collection activities when warranted by circumstances."); *In re* Fletcher, 2007 Bankr. LEXIS 4718, at *1–2 (finding that because debtor is paying through his plan the child support obligations that led to revocation of license, reinstatement was warranted).

Once a debtor receives a discharge, a court must consider whether the obligation that resulted in the license suspension remains in effect. A state does not violate the discharge injunction by refusing to reinstate a suspended driver's license if the subject obligation is excepted from discharge.[171]

D. Bankruptcy Schedules

A debtor must affirm the veracity of the schedules and Statement of Financial Affairs under oath.[172] While a debtor may invoke the privilege against self-incrimination in a bankruptcy case, generally "the Fifth Amendment does not excuse a bankruptcy debtor from filing schedules in the case."[173]

However, the filing of schedules may bring consequences. As the Bankruptcy Court for the Eastern District of Tennessee, in *In re Brandenburg*, explained: "In this case, it appears that the [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."[174] The court, however, held that the debtor could invoke the privilege as to related "follow-

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171 Fish v. Pasco County Fla. Traffic Div. (*In re* Fish), Case No. 12-cv-2498-T-33, 2013 U.S. Dist. LEXIS 36837, at *5–7 (M.D. Fla. Mar. 18, 2013) (holding that refusing to reinstate driver's license due to non-payment of traffic fine does not violate discharge injunction because traffic fines fall within exception to discharge of § 523(a)(7)); *In re* Eyiowuawi, No. 09-75950-MGD, 2011 Bankr. LEXIS 5240, at *3 (Bankr. N.D. Ga. Oct. 28, 2011) ('[T]he Court rules that the debt owed by Debtor . . . for parking fines is excepted from discharge under 11 U.S.C. § 523(a)(7). The debt is therefore not protected by the discharge injunction of 11 U.S.C. § 524(a).").

172 *In re* Bohrer, 266 B.R. 200, 201 (Bankr. N.D. Cal. 2001) ("Statements in bankruptcy schedules are executed under penalty of perjury.").

173 United States Tr. v. Gregg (*In re* Gregg), 510 B.R. 614, 625 (Bankr. W.D. Mo. 2014).

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

up" questions beyond the information expressly stated in the schedules, provided that the debtor showed a reasonable fear of prosecution.[175]

When a debtor's petition is involuntary, at least one court seems to find the privilege against self-incrimination applicable to § 521. The Bankruptcy Court for the District of Hawaii, in *In re Kaufman*, stated:

> [T]o require [the debtor] to prepare in writing a list of creditors, a schedule of assets and liabilities, and a statement of financial affairs may result in information that may be used against [the debtor] in a criminal action. The [d]ebtor would then be compelled to be a witness against himself. This is prohibited by the Fifth Amendment.[176]

Although the court in *Kaufman* fails—in its extraordinarily short written order—to emphasize the involuntary nature of the debtor's petition, that the debtor was forced into bankruptcy is a key distinction.[177]

E. Section 341(a) Meetings and Rule 2004 Examinations

A debtor's § 341(a) meeting and any Rule 2004 examinations are considered testimonial.[178] A debtor can assert the privilege against self-incrimination in either setting, and a debtor can be found to have waived the privilege against self-incrimination based on earlier conduct in the case.[179]

For example, the Bankruptcy Court for the Southern District of Alabama, in *In re LaForce*, held that a debtor may waive his right to the privilege against self-

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175 *Id.* at *13.

176 *In re* Kaufman, 35 B.R. 26, 28 (Bankr. D. Haw. 1983).

177 *Id.*

178 *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).

179 *See e.g., In re* Mudd, 95 B.R. 426, 427 (Bankr. N.D. Tex. 1989); *In re* Cotillion Invs., Inc., 344 B.R. at 350–51.

incrimination by submitting their schedules and Statement of Financial Affairs.[180] There, the debtor was arrested and found with cash he had not reported in his Schedules or Statement of Financial Affairs.[181] The debtor then invoked the Fifth Amendment privilege against self-incrimination when asked about those funds at his § 341(a) meeting.[182] On a motion to compel his testimony, the court found that the debtor's failure to assert the Fifth Amendment in response to the questions on his schedules and Statement of Financial Affairs constituted a waiver of his right not to answer questions on the same topics at his § 341(a) meeting.[183]

On the other hand, submitting to examination and testifying under oath at a § 341(a) meeting does not automatically waive a debtor's right to later invoke the privilege against self-incrimination. The Bankruptcy Court for the Northern District of Texas, in *In re Hulon*, denied a Chapter 7 trustee's motion for contempt and to compel a debtor to testify at a 2004 Examination after the debtor failed to assert the Fifth Amendment privilege at the § 341(a) meeting.[184]

There, the debtor submitted to an examination by creditors at the required § 341(a) meeting, but several months after the § 341(a) meeting, the debtor appeared at a Rule 2004 examination, refused to testify under oath, and remained silent.[185] The debtor and her bankruptcy counsel were accompanied to the Rule 2004 examination by the debtor's criminal defense attorney because the debtor,

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180 United States Bankruptcy Adm'r v. LaForce (*In re* LaForce), 593 B.R. 853, 861 (Bankr. S.D. Ala. 2018).
181 *Id.*
182 *Id.*
183 *Id.*
184 92 B.R. 670, 671 (Bankr. N.D. Tex. 1988).
185 *Id.* at 672.

after her § 341(a) meeting, discovered that the Department of Justice and the Federal Bureau of Investigation began investigating her financial and personal affairs.[186] The Chapter 7 trustee moved for sanctions, requesting the court enter an order holding the debtor in contempt and sought an order compelling the debtor's testimony at a later Rule 2004 examination.[187]

In its analysis, the court noted that the bankruptcy process, in contrast to a criminal prosecution—which must protect accused individuals from forcing them to assist 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."[188] The court acknowledged that the privilege against self-incrimination may be waived by an individual's prior statements, but found "Courts indulge every reasonable presumption against finding a testimonial waiver."[189]

The court applied a two-part test to determine whether it should infer a waiver of the debtor's privilege against self-incrimination.[190] First, the court must determine whether the debtor's "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."[191] And second, waiver should be inferred only where "the debtor

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186 *Id*.
187 *Id*.
188 *Id*. at 673.
189 *Id*. (citing Klein v. Harris, 667 F.2d 274, 287 (2d Cir. 1981)).
190 *Id*.
191 *Id*.

had reason to know that prior statements would be interpreted as a waiver of the privilege."[192]

The first prong "should only be inferred in the most compelling circumstances."[193] Compelling circumstances exist where a failure to find a waiver would unduly prejudice the trustee.[194]

Citing Supreme Court precedent, the court noted "a waiver of the privilege [against self-incrimination] does not affect the debtor's right to assert the privilege in another proceeding."[195] Applying the privilege against self-incrimination the context of a bankruptcy case, the court looked to the statutes giving rise to bankruptcy jurisdiction and found that Congress made a distinction between the terms "case" and "proceeding."[196] Highlighting that many proceedings may be brought within one bankruptcy case, the court assumed that the § 341(a) meeting constituted part of the same "proceeding" as the Rule 2004 examination.[197] The court determined that the debtor could refuse to answer any questions about matters discussed previously, even if the prior facts revealed "are incriminating, as long as the answers may tend to further incriminate."[198] Because the debtor's testimony at the § 341(a) meeting triggered the federal investigation of the debtor, the court found the possibility of further incrimination existed.[199] The court

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192 *Id*. *See also* United States v. Singer, 785 F.2d 228, 241 (8th Cir. 1986).
193 *Id*. (citing *Klein*, 667 F.2d at 288).
194 *Id*.
195 *Id*.
196 *Id*. (citing 28 U.S.C. § 157).
197 *Id*. at 674.
198 *Id*. (citing *In re* Master Key Litigation, 507 F.2d 292, 294 (9th Cir. 1974)).
199 *Id*.

explained, the "information [sought by the trustee], if elicited from the debtor, may tend to further incriminate the debtor by helping the government pinpoint more fruitful areas of inquiry."[200]

The court also found the debtor's circumstances failed to meet the second prong of the inferred waiver test.[201] The second prong, or the "reason to know" principle, requires that the statements made directly inculpate the individual on the charges at issue.[202] The court explained that such responses "provide a clue leading investigators to discover facts that could constitute links in a chain of circumstantial evidence proving the invoker's criminal conduct."[203] The court found that at the § 341(a) meeting, the debtor made no "considered choice" and thus had no "reason to know" that the privilege might be waived.[204] The court pointed out that of the twenty-six page transcript from the § 341(a) meeting, for twenty-four pages, the debtor's attorney questioned the debtor.[205] The court explained, "if the complexity of the law forces a person to speak through an attorney, the ability of the attorney to waive the rights of the person should be extremely limited."[206] The court found the debtor could not have known that responding to questions of her attorney would result in a waiver of her right against self-incrimination.[207]

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200 *Id*. (citing Ballantyne v. United States, 237 F.2d 657, 664–65 (5th Cir. 1956)).
201 *Id* at 674–75.
202 *Id*. at 674 (citing *Klein*, 667 F.2d at 288).
203 *Id*.
204 *Id*.
205 *Id*. at 674–75.
206 *Id*. at 675.
207 *Id*.

F. Plan Confirmation

To confirm a plan, a debtor must establish that the plan has been proposed in good faith and not by any means forbidden by law.[208] Good faith is determined by examining the totality of the circumstances.[209] In the Eleventh Circuit, courts evaluate the totality of the circumstances by applying nonexclusive factors established in *Kitchens*.[210] A debtor bears the "burden of proving good faith by a preponderance of the evidence."[211]

A debtor that invokes the right against self-incrimination during a bankruptcy case may face a significant hurdle in convincing the bankruptcy judge that their plan is proposed in "good faith."[212] However, the Eleventh Circuit has held that a debtor's invocation of the Fifth Amendment during a case should not serve as the sole basis for a determination that a plan is not proposed in good faith.[213]

In *McCormick*, the individual Chapter 11 debtor appealed the court's denial of confirmation of his plan of reorganization.[214] The bankruptcy court refused to confirm the debtor's plan because the debtor, invoking his Fifth Amendment

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208 11 U.S.C. § 1325(a)(3); *see also* 11 U.S.C. § 1325(a)(7) (petition must be filed in good faith). Although this is a consumer law session, confirmation of plans in chapter 11 and chapter 12 also contain a good faith requirement. *See* 11 U.S.C. §§ 1129(a)(3); 1225(a)(3).

209 Kitchens v. Ga. R.R. Bank & Trust Co. (*In re* Kitchens), 702 F.2d 885, 888–89 (11th Cir. 1983).

210 *Id*.

211 *In re* Thomas, 443 B.R. 213, 217 (Bankr. N.D. Ga. 2010) (citing Smyrnos v. Padilla (*In re* Padilla), 213 B.R. 349, 352 (B.A.P. 9th Cir. 1997)).

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

213 *Id*.

214 *Id*.

privilege against self-incrimination, refused to testify in a related adversary proceeding.[215] After the district court affirmed the denial of confirmation, the debtor appealed to the Eleventh Circuit.

The Circuit Court held that "the 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."[216] The court evaluated the totality of the circumstances and found only the debtor's refusal to testify that showed any bad faith on the part of the debtor.[217] The Eleventh Circuit further held that if the debtor's "failure to testify at the…deposition did not impede the basic bankruptcy administration of his case, however, assertion of his Fifth Amendment privilege alone cannot be the basis for denying confirmation of his plan."[218] Thus, Eleventh Circuit precedent establishes that a debtor's invocation of the Fifth Amendment privilege against self-incrimination should not by itself cause denial of plan confirmation unless it "impedes the basic bankruptcy administration" of the case.[219]

This approach caused dismissal of a Chapter 13 debtor's case in *In re Wineck.*[220] There, the debtor invoked his Fifth Amendment right against self-incrimination in response to a question in his Statement of Financial Affairs and

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215 *Id*.
216 *Id*. at 1525-26.
217 *Id.*
218 *Id.* at 1527.
219 *Id*.
220 202 B.R. 161, 169 (Bankr. M.D. Fla. 1996) (Glenn, J.).

schedules regarding the amount of income received from his employment or business.[221] In addition, the debtor invoked his Fifth Amendment right against self-incrimination in response to the Statement of Current Income's request for information regarding the debtor's occupation, employment, gross income, and monthly take home pay.[222] Finally, the debtor invoked his Fifth Amendment right when answering questions at the meeting of creditors.[223] The trustee filed a motion to dismiss on the grounds that the debtor did not file his bankruptcy case in good faith.[224]

The court dismissed the case because the debtor failed to demonstrate "credible reasons why responding to questions concerning his income poses a real danger of incrimination."[225] The court also found that the debtor's refusal to provide the requested information "impedes the administration of his Bankruptcy case."[226] The requested information was essential for determining whether the debtor's plan was confirmable and whether the debtor was eligible for Chapter 13.[227]

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221 *Id*. at 164.
222 *Id*.
223 *Id*. at 165.
224 *Id*.
225 *Id*. at 169.
226 *Id*.
227 *Id*.

G. Turnover of Estate Property

Turnover of property of the estate is generally not considered a testimonial act and does not implicate Fifth Amendment rights.[228] "[B]ecause the turnover of property of the estate . . . does not compel testimony on his part, [a] debtor may not decline to surrender assets of the estate on the basis of the privilege against self-incrimination. The debtor's obligation to surrender his assets is outside the protective scope of the Fifth Amendment."[229]

Case examples include *In re LaForce*,[230] where the debtor was required to turn over cash that was estate property, which he had resisted turning over on Fifth Amendment grounds, and *In re Schick*,[231] where the court required a debtor to turnover a computer and the information thereon.

H. Objections to Discharge (11 U.S.C. § 727)

Fifth Amendment issues are prone to arise in actions seeking to deny a debtor's discharge under § 727. Several provisions of § 727 may be triggered where a debtor fails to cooperate in the bankruptcy process. A debtor's failure (or refusal) to comply with the bankruptcy process may arise from concerns about self-incrimination. A debtor may further fear waiving their privilege against self-

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228 Renteria v. Abele (*In re* Renteria), BAP No. AZ-07-1261-PaMkKu, 2007 Bankr. LEXIS 4846, at *20 (B.A.P. 9th Cir. Dec. 14, 2007) (citing *In re* Ross, 156 B.R. 272, 277 (Bankr. D. Idaho 1993); *In re* Devereux, 48 B.R. 645–46 (Bankr. S.D. Cal. 1985); *In re* Kaufman, 35 B.R. 26 (Bankr. D. Haw. 1983)).

229 *In re* Crabtree, 39 B.R. 726, 731 (Bankr. E.D. Tenn. 1984).

230 593 B.R. 853, 861 (Bankr. S.D. Ala. 2018).

231 215 B.R. 4, 12 (Bankr. S.D.N.Y. 1997). In *Schick*, the court left open the possibility that a debtor in possession of estate property may be able to demonstrate that the act of production is incriminating. *Id.* at 10–12.

incrimination. In these types of cases, a bankruptcy court may find cause to deny a discharge.

Moreover, criminal liability may be linked to actions taken that deliberately impair or impede the bankruptcy process. Section 727(a)(2)(B), for example, provides that a debtor may be denied a discharge where the debtor has transferred, removed, destroyed, mutilated, or concealed property of the estate post-petition.[232] Similarly, under § 727(a)(4), a debtor may be denied a discharge where the debtor has knowingly and fraudulently made a false oath or account, presented a false claim, coerced the actions of other parties through bribes, or withheld books and records from an officer of the bankruptcy estate.[233] Both subsections provide grounds to deny discharge while also exposing a debtor to potential criminal liability.

Section 727 has a subsection that deals directly with a debtor's right against self-incriminatory testimony—§ 727(a)(6)(C). A bankruptcy court cannot deny a debtor's discharge on the basis that the debtor "takes the Fifth" in a bankruptcy case.[234] Under § 727(a)(6)(C), a court shall grant the debtor a discharge unless the debtor has refused in the case to testify on grounds other than a properly invoked privilege against self-incrimination. In other words, a party seeking to block a debtor's discharge cannot do so simply because the debtor properly refuses to

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232 11 U.S.C. § 727(a)(2)(B).
233 11 U.S.C. § 727(a)(4).
234 11 U.S.C. § 727(a)(6)(C).

testify. However, § 727(a)(6)(B) provides that the debtor may not refuse to testify if the debtor has been granted immunity.[235]

A 2005 decision of the Tenth Circuit Court of Appeals evaluates § 727(a)(6)(A) .[236] In *Martinez*, the debtors refused to answer questions at Rule 2004 examinations. A creditor moved to compel the debtors to answer specific questions. The court found that the debtors had properly invoked their Fifth Amendment rights as to some questions, and ordered the debtors to answer those.[237] When the debtors at a later Rule 2004 examination refused to answer several questions in violation of the court's order, the creditor filed a complaint under § 727(a)(6)(A).[238] The bankruptcy court granted summary judgment in favor of the creditor and denied the debtors' discharge.[239] The order of the bankruptcy court was affirmed by both the district court and the Tenth Circuit Court of Appeals. The Circuit Court emphasized that the loss of the discharge under this code section was not due to the debtors' assertion of their Fifth Amendment rights, but because the debtors' invoked (improperly) their Fifth Amendment rights after receiving the court's ruling that such invocation was improper.[240] In other words, "once

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235 Denial of discharge is one of several available penalties a court may choose to institute against an individual refusing to testify after a grant of immunity. A court could also find a debtor in contempt or dismiss a debtor's case. *See, e.g.,* Martin-Trigona v. Belford (In re Martin-Trigona), 732 F.2d 170, 173-74 (2d Cir. 1984) (contempt); *In re Connelly*, 59 B.R. 421, 447–48 (Bankr. N.D. Ill. 1986) (dismissal).

236 Martinez v. Los Alamos Nat'l Bank (*In re* Martinez), 126 F. Appx. 890, 892 (10th Cir. 2005).

237 *Id.* at 892.

238 *Id*. at 893.

239 *Id*. at 894.

240 *Id.* at 897.

the [debtors] ha[ve] an opportunity to reconsider whether to testify in contradiction of a judicial ruling on the Fifth Amendment privilege and then continue[] to refuse, [they] may be denied certain benefits and exposed to negative consequences as a result of improperly reinvoking the privilege."[241]

I. Objections to Dischargeability of Specific Debts (11 U.S.C. § 523)

Fifth Amendment issues may arise in § 523 actions to except specific debts from discharge in a Chapter 7 case. Certain subsections of § 523 implicate potential criminal issues. The following are examples:

> A discharge under section 727, 1141, 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt–
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> (a)(1)(c) for a tax or a customs duty– with respect to which the debtor made a fraudulent return….
>
> (a)(2)(A) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by …. actual fraud….
>
> (a)(4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny; [or]
>
> (a)(13) for any payment of an order of restitution issued under title 18, United States Code[242]

However, a debtor's invocation of the privilege in a § 523 action cannot be the sole basis for a determination that the debt is nondischargeable.[243] In *Galan*, the Bankruptcy Court for the District of Idaho held that "the fact that debtor invoked

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241 *Id.*

242 11 U.S.C. §§ 523(a)(1)(C), (a)(2)(A), (a)(4), and (a)(13).

243 Mauso v. Galan (*In re* Galan), 455 B.R. 214 (Bankr. D. Idaho 2011).

the Fifth Amendment privilege against self-incrimination does not, in and of itself, warrant excepting creditor's debt from discharge."[244]

Another court entered default in a § 523 action based on a debtor's failure to produce documents.[245] In *In re Bartlett*, the plaintiff in an adversary proceeding filed a complaint objecting to the dischargeability of a debt under § 523.[246] The debtor refused to comply with an order compelling production of certain documents by invoking his Fifth Amendment privilege against self-incrimination.[247] The plaintiff then filed a motion for default judgment on the grounds that the debtor failed to comply with the court's order compelling production.[248]

The court granted the plaintiff's motion for default judgment.[249] The court reasoned that it could only find a debtor to be justified in asserting the Fifth Amendment privilege if the debtor "produced, for the Court's consideration, a meaningful, articulation of the reasons why particular requested documents would tend to incriminate him."[250] The court determined that:

> [A] voluntary chapter 7 debtor is required to produce documents necessary to the trial of an objection to the discharge of a particular debt under Section 523 of the Bankruptcy Code, notwithstanding any incidental incriminating effect of such production, if said debtor wishes to pursue and obtain the

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244 *Id.* at 226. *See also* Trustmark Nat'l Bank v. Curtis (*In re* Curtis), 177 B.R. 717, 720 (Bankr. S.D. Ala. 1995) ("[T]he invocation of the Fifth Amendment privilege, standing alone, is not sufficient evidence to constitute probative proof of a plaintiff's case" under § 523.).

245 Gen. Motors Acceptance Corp. v. Bartlett (*In re* Bartlett), 162 B.R. 73, 79 (Bankr. D.N.H. 1993).

246 *Id*. at 74.

247 *Id.*

248 *Id.*

249 *Id*. at 79

250 *Id.*

> discharge of the debt in question by virtue of his bankruptcy filing.[251]

The discharge in Chapter 13 also provides exceptions to discharge that overlap with criminal law. Section 1328(a)(3) excepts debt for criminal restitution from discharge.[252] This remnant of the Chapter 13 "super discharge" remains a narrower exception to discharge than the Chapter 7 exceptions set forth in § 523(a).[253]

J. Preference Actions (11 U.S.C. § 547)

A trustee can recover a criminal fine or fee paid to a government entity as a preferential payment under § 547.[254] Under § 547, a trustee may avoid any transfer of an interest of the debtor in property if five elements are met: (1) the transfer was to or for the benefit of a creditor; (2) the transfer was on account of an antecedent debt owed by the debtor before such transfer was made; (3) the transfer was made while the debtor was insolvent; (4) the transfer was made within ninety days before the petition date; and (5) the transfer enabled the creditor to receive more than it would have in a chapter 7 case.[255] The Bankruptcy Court for the District of Arizona, in *Movitz v. Maricopa County (In re Ball)*, avoided a debtor's payment of $1,144.19, finding that the payment was not imposed as part of a criminal sentence and was subject to turnover.[256] There, the debtor was prosecuted for issuing bad

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251 *Id*.
252 11 U.S.C. § 1328(a)(3).
253 11 U.S.C. §§ 523(a), 1328(a).
254 *See* Movitz v. Maricopa Cty. (*In re* Ball), 257 B.R. 309, 311 (Bankr. D. Ariz. 2001).
255 11 U.S.C. § 547(b).
256 257 B.R. at 309, 312.

checks.[257] Following his prosecution, the debtor tendered $10,000 to the County Attorney's Office.[258] The County Attorney disbursed $8,855.81 to a victim of the debtor, and kept the balance as a fee, which was authorized by statute.[259] Within ninety days of that payment, the debtor filed a chapter 7 petition.[260]

In response to the trustee's assertion that the debtor's payment of the fee to the County was preferential, the County argued that (1) it was not a creditor of the debtor, and (2) the payment was in nature of restitution and therefore should not be recoverable. Citing Supreme Court precedent, the court determined that the County was a creditor, because it had a claim, regardless of whether the statutory fee obligation was a criminal fine or a restitution obligation.[261] The court reasoned, "[t]he preference statute provides the debtor no 'haven' and does not exist for the benefit of the debtor, nor is there any inherent reason why a government entity should be entitled to enact criminal statutes that are exempt from the preference provisions of the Bankruptcy Code."[262] The court explained "[t]he preference statute exists to implement two fundamental policies of bankruptcy law: the 'prime bankruptcy policy of equality of distribution among creditors,' and to 'reduce[] the

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257 *Id*. at 309. The victim-recipient of the $8,855.81 tendered those funds to the trustee upon request.

258 *Id*. at 311.

259 *Id*.

260 *Id*.

261 *Id*. at 313. The court discusses the holdings of Kelly v. Robinson, 479 U.S. 36(1986) and of Penn. Dept. of Public Welfare v. Davenport, 495 U.S. 552, 557-60(1990) in its analysis of whether the County had a claim. *Davenport* found that restitution is a debt under § 101(12) and thus a claim under § 101(5), explaining, "[t]he plain meaning of a 'right to payment' is nothing more nor less than an enforceable obligation, regardless of the objective the State seeks to serve in imposing the obligation." 495 U.S. at 557-60.

262 *Id*. at 314.

incentive to rush to dismember a financially unstable debtor.'"[263] Further, because the preference statute serves no benefit to the debtor, but rather ensures that no one creditor receives preferential treatment over another immediately preceding the bankruptcy filing, a statute allowing processing fees as part of a criminal statute entitles a government entity to preferential treatment among creditors.[264]

Additionally, the court noted the difference between the preference statute and the discharge exceptions.[265] Section 547 includes no special treatment for "criminal fines, penalties, forfeitures, or restitution . . . except as specifically set forth in the exceptions of § 547(c)."[266]

The court ordered turnover of the fee to the trustee but noted that the fee may be excepted from discharge.[267] Although the amount may be nondischargeable, the court reasoned "what has been collected from property that should have been property of the chapter 7 estate, or that would have been the debtor's exempt property, must be returned to the estate and shared pro rata among all creditors."[268]

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263 *Id.* (quoting *In re* Smith, 966 F.2d 1527, 1535 (7th Cir. 1992)).
264 *Id.*
265 *Id.*
266 *Id.*
267 *Id.*
268 *Id.* at 314–15