

‘Taking the Fifth’ in Bankruptcy

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The Fifth Amendment of the Constitution encompasses many important rights granted to criminal defendants – including the safeguard against double jeopardy and the right to due process of law before being deprived of life, liberty or property. The Fifth Amendment privilege against self-incrimination is among the most well-known rights invoked by litigants in the American judicial system. In common parlance, when we say someone “took the Fifth,” we mean that she has invoked her right not to “be compelled in any criminal case to be a witness against [her]self.”¹

While we tend to think of someone “taking the Fifth” in the context of criminal matters, the right against self-incrimination also arises in civil contexts, including bankruptcy cases.² The Fifth Amendment privilege may be implicated when individuals³ are examined under oath during section 341 meetings of creditors, Bankruptcy Rule 2004 examinations, depositions and court proceedings, or are compelled to produce documents.

In bankruptcy cases, the decision to assert or waive the Fifth Amendment privilege is a tactical one that requires consideration of both its civil and criminal implications. In addition, trustees and others examining an individual asserting the Fifth Amendment privilege must properly preserve their lines of inquiry in the face of the asserted privilege.

Assertion of the Fifth Amendment privilege – and a trustee’s response to such an assertion – can raise issues not typically confronted in a bankruptcy case. This article will present a continued section 341 meeting in five scenes, with corresponding discussions, to highlight certain Fifth Amendment privilege issues that may arise in bankruptcy cases.

Issue I: Assertion of Privilege as to Documents

Scene

¹ See U.S. CONST. amend. V.

² See *McCarthy v. Arndstein*, 266 U.S. 34, 40 (1924) (“The privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it.”).

³ Importantly, only individuals, not corporations or other non-individuals, are protected by the Fifth Amendment privilege. See *Hale v. Henkel*, 201 U.S. 43, 74 (1906) (“[W]e are of the opinion that there is a clear distinction . . . between an individual and a corporation, and . . . the latter has no right to refuse to submit its books and papers for an examination at the suit of the state.”).

Chapter 13 debtor Jane Dane is a former accountant for ABC Corporation, the largest unsecured creditor listed in Ms. Dane's Schedule E/F. During the initial meeting of creditors in Ms. Dane's case, the chapter 13 trustee noted that Ms. Dane's most recent bank statement reflected an unusually large wire transfer deposit from ABC Corporation. The statement also showed later substantial wire transfers from Ms. Dane's bank account to a bank account owned by D&D Corporation, a corporation that Ms. Dane owns with Mr. Dane, her non-filing spouse. The trustee continued the meeting of creditors and requested that Ms. Dane, the records custodian for D&D Corporation, bring additional documents to the continued meeting, including a general ledger for D&D Corporation.

Ms. Dane now appears at the continued meeting of creditors with her attorney, Anna Counsel. Mr. Dane and attorney John Creditor, counsel for ABC Corporation, also are present.

Ms. Dane testifies under oath at the continued meeting of creditors. When asked by the trustee if she brought the general ledger for D&D Corporation with her as the trustee had requested, Ms. Dane responds: "Yes, but I'm afraid I'm going to have to plead the Fifth about the ledger."

Discussion

Ms. Dane asserts her Fifth Amendment privilege against self-incrimination as to the information in D&D Corporation's general ledger, and refuses to turn it over. However, an individual acting in an official capacity may not rely on the Fifth Amendment privilege to avoid producing corporate records in response to a subpoena requiring their production.⁴ The contents of corporate business records are not privileged⁵ and corporate record custodians may not successfully resist a subpoena for such records on the grounds that the records will incriminate them.⁶

A Fifth Amendment privilege assertion may be successful if the act of production itself would self-incriminate an individual.⁷ In *United States v. Doe*, the U.S. Supreme Court found

⁴ See *Bellis v. United States*, 417 U.S. 85, 88 (1974); *In re Grand Jury Subpoena Issued June 18, 2009*, 593 F.3d 155 (2d Cir. 2010) (rule applies to corporations owned by one individual; collecting cases).

⁵ *Fisher v. United States*, 425 U.S. 391, 409 (1976) ("[T]he Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the taxpayer, for the privilege protects a person only against being incriminated by his own compelled testimonial communications.").

⁶ *Braswell v. United States*, 487 U.S. 99, 110 (1988) ("[T]he custodian's act of production is not deemed a personal act, but rather an act of the corporation. Any claim of Fifth Amendment privilege asserted by the agent would be tantamount to a claim of privilege by the corporation – which of course possesses no such privilege.").

⁷ See *United States v. Doe*, 465 U.S. 605, 613 (1984) (holding that although the contents of a document may not be privileged, the act of producing the document may be).

that the production of the documents by a sole proprietor was protected by the Fifth Amendment privilege.⁸ However, this exception does not extend to a business operated through the corporate form.⁹

The trustee and Ms. Counsel agree that after the issue is properly framed,¹⁰ they may need a hearing before the bankruptcy court to resolve the issue of whether Ms. Dane's Fifth Amendment privilege extends to the corporate general ledger, or if Ms. Dane can assert the privilege because the act of production itself could self-incriminate her.

Issue II: Waiver of the Privilege

Scene

Mr. Creditor now examines Ms. Dane on behalf of ABC Corporation. He asks Ms. Dane how much money she owes to ABC Corporation. Ms. Dane disavows owing any money to ABC Corporation. On her Schedule E/F, however, Ms. Dane disclosed that she owes ABC Corporation "at least \$275,000." When pressed for clarification, Ms. Dane asserts her Fifth Amendment privilege.

Discussion

By listing ABC Corporation on her Schedule E/F with an unsecured claim of at least \$275,000, Ms. Dane likely waived her Fifth Amendment privilege as to that admitted fact. Individuals may waive the right to invoke the Fifth Amendment privilege at subsequent proceedings if they have previously disclosed incriminating facts.¹¹ The filing of documents such as schedules or statements of financial affairs also may waive the Fifth Amendment privilege for purposes of a later or parallel criminal case.¹²

⁸ *Id.* at 613-14.

⁹ *See Braswell v. United States*, 487 U.S. 99, 104 (1988).

¹⁰ Ms. Dane was under no compulsion to produce the general ledger to the trustee at the continued meeting of creditors. To properly frame the issue, the trustee or other party seeking the general ledger would take appropriate steps to formally compel its production after which the matter could be presented to the court for decision if Ms. Dane continued to assert the privilege.

¹¹ *See Rogers v. United States*, 340 U.S. 367, 373 (1951) ("[W]here criminating facts have been voluntarily revealed, the privilege cannot be invoked to avoid disclosure of the details.").

¹² *See Czarlinsky v. United States*, 54 F.2d 889, 893 (10th Cir. 1931) (by filing the bankruptcy schedules without objection, the defendant waived the privilege as to use of the schedules in a subsequent criminal trial).

Courts do not lightly infer waiver of the Fifth Amendment privilege.¹³ The Second Circuit concluded that a waiver should be inferred only if: (1) prior statements create a significant likelihood that the fact finder will be left with, and prone to rely on, a distorted view of the truth; and (2) the person had reason to know that prior statements would be interpreted as a waiver of the privilege.¹⁴ The Second Circuit's test has been applied to find both waiver and non-waiver of the Fifth Amendment privilege.¹⁵ Accordingly, the facts and circumstances of an alleged waiver are critical.

After some discussion, Ms. Dane finally acknowledges that she stated under penalty of perjury in Schedule E/F that she owes ABC Corporation at least \$275,000 but testifies that she does not have any better calculation of the actual amount.

Issue III: No Blanket Assertion of the Privilege

Scene

Mr. Creditor next questions Ms. Dane about the automobile listed on Schedule A/B valued at \$75,000. Ms. Dane testifies that she purchased the car a month before filing bankruptcy and paid for it in cash.

When Mr. Creditor asks Ms. Dane how she could afford to pay \$75,000 in cash for a car one month before the bankruptcy filing, Ms. Dane asserts her Fifth Amendment privilege. Mr. Creditor attempts to ask additional questions, but Ms. Dane states that she is not answering any more questions – she is “taking the Fifth.”

Discussion

Here, Ms. Dane has attempted to assert a blanket privilege and refuses to answer any more questions, effectively cutting off Mr. Creditor's line of inquiry about the purchase of the new car. However, a blanket objection to questions on Fifth Amendment privilege grounds is not appropriate.¹⁶ Instead, the individual should assert the privilege with respect to each question.¹⁷

While tedious, this process is necessary for examining counsel to preserve any negative inference that may be drawn from a witness's refusal to testify. It also is necessary to properly

¹³ *Klein v. Harris*, 667 F.2d 274, 287 (2nd Cir. 1981).

¹⁴ *Id.*

¹⁵ *See In re Hulon*, 92 B.R. 670, 673-74 (Bankr. N.D. Tex. 1988) (holding debtor did not waive Fifth Amendment privilege by testifying under oath at § 341 meeting of creditors); *In re Mudd*, 95 B.R. 426, 429 (Bankr. N.D. Tex. 1989) (holding debtor waived privilege through prior § 341 meeting and Rule 2004 testimony).

¹⁶ *See SEC v. First Fin. Group of Texas, Inc.*, 659 F.2d 660, 668 (5th Cir. 1981).

¹⁷ *Id.* at 668-69.

frame the issues in the event examining counsel wants to challenge the assertion of the privilege as to a specific question.

The trustee asks Mr. Creditor to continue with his questions and suggests that Ms. Counsel encourage her client to respond to every question even if the response is the assertion of the Fifth Amendment privilege in every instance.

Issue IV: The Negative Inference

Scene

Mr. Creditor tells Ms. Counsel that Ms. Dane will suffer the consequences of negative inferences that may be drawn later from each refusal to testify. Ms. Counsel asks to go off the record so that she can speak with her client.

Discussion

Civil courts may draw a negative inference from a witness's assertion of Fifth Amendment privilege and refusal to testify at trial.¹⁸ “[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.”¹⁹ This means that when a witness asserts the Fifth Amendment privilege and refuses to testify, an inference may be made in future civil litigation that the responses to the questions the witness refused to answer would have been self-incriminating. The negative inference alone, however, is not enough to prove a case.²⁰

Ms. Dane is in a tough spot. If she testifies, she might incriminate herself. But if she asserts her Fifth Amendment privilege not to testify, she may suffer the consequences of the negative inference in future civil litigation.

Back on the record, Ms. Dane opts to answer Mr. Creditor's questions the best she can so as not to suffer the negative inference in future litigation.

Issue V: Privilege as a Personal Right

Scene

¹⁸ *Farace v. Indep. Fire Ins. Co.*, 699 F.2d 204, 210 (5th Cir. 1983).

¹⁹ *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976).

²⁰ *See Avirgan v. Hull*, 932 F.2d 1572, 1580 (11th Cir. 1991) (“The negative inference, if any, to be drawn from the assertion of the fifth amendment does not substitute for evidence needed to meet the burden of production.”); *United States v. White*, 589 F.2d 1283, 1287 (5th Cir. 1979) (“[A] grant of summary judgment merely because of the invocation of the fifth amendment would unduly penalize the employment of the privilege.”).

Mr. Creditor starts to ask Ms. Dane probing questions about the source of money that Mr. Dane reportedly lost gambling. Mr. Dane suddenly declares: “She takes the Fifth!”

Discussion

The Fifth Amendment privilege is “purely personal” and cannot be invoked by any party other than the individual.²¹ This means that only Ms. Dane – and not Mr. Dane as her spouse – may assert the privilege on her behalf. This makes sense because “[s]ome constitutional rights are personal and may not be vicariously asserted. Among these is the right against self-incrimination.”²²

Conclusion

Ms. Dane’s future appears uncertain at the conclusion of her section 341 meeting. In compliance with United States Trustee Program guidance, the chapter 13 trustee will make a record of each question as to which Ms. Dane asserted her Fifth Amendment privilege, will continue the meeting of creditors and will inform the U.S. Trustee that the debtor has asserted the privilege.²³ ABC Corporation may be contemplating a non-dischargeability action against Ms. Dane and both it and the trustee may be considering a motion to dismiss or convert and/or an objection to confirmation. Possible false statements in Ms. Dane’s statement of financial affairs regarding income or transfers also ultimately could result in a criminal referral.²⁴

Debtors submit themselves to the bankruptcy court’s jurisdiction when they file a voluntary petition. The requirements of the Bankruptcy Code and the possibility of disclosure or fraudulent omission of incriminating facts in schedules and statements of financial affairs create a unique tension for debtors and their counsel in these situations. Counsel and trustees alike should remain sensitive to the power and perils of “taking the Fifth” in bankruptcy proceedings. Counsel for prospective debtors who have engaged in criminal activity also are well advised to consult with criminal counsel before the bankruptcy case is filed to fully explore the potential pitfalls of filing for bankruptcy.

²¹ *United States v. Ayers*, 615 F.2d 658, 660 (5th Cir. 1980).

²² *Hall v. United States*, 413 F.2d 45, 48 (5th Cir. 1969).

²³ *Handbook for Chapter 13 Standing Trustees (October 2012)*, chapter 3, section B.9.

²⁴ *See* 28 U.S.C. § 586(a)(3)(F).