

COMMERCIAL LITIGATION

Converting a Fifth Amendment Invocation into a Negative Inference

By Leo K. Barnes Jr.

Last month we addressed the transformation of a criminal court plea or guilty verdict into civil court liability relying upon collateral estoppel. This month we take a step back.

Assume that the civil case is in the midst of discovery, the corresponding criminal case is also still pending prior to plea or verdict, and that the adverse party's deposition yields a slew of Fifth Amendment invocations. There is opportunity, once again, to turn the lemons into lemonade by convincing the Court that the Fifth Amendment invocation warrants a negative inference which may advance the likelihood of achieving judgment on liability.

The Fifth Amendment at a Deposition

Of course, a witness in civil litigation may invoke the privilege against self-incrimination if she has reasonable cause to apprehend danger from a direct answer. However, the privilege does not relieve the party of the usual evidentiary burden attendant upon a civil proceeding; nor does it afford any protection against the conse-

quences of failing to submit competent evidence.¹

It is settled that invoking the privilege against self-incrimination is generally an insufficient basis for precluding discovery in a civil matter.² As the Court of Appeals stated in *Steinbrecher v. Wapnick*:

When a defendant fails to present evidence on his own behalf in a civil case * * * but chooses instead to assert his constitutional privilege, he places himself at an obvious disadvantage. Moreover * * * the courts need not permit a defendant to avoid this difficulty by staying the civil action until a pending criminal prosecution has been terminated (*see Langemyr v. Campbell*, 21 N.Y.2d 796 [288 N.Y.S.2d 629, 235 N.E.2d 770]; cf. *Oleshko v. New York State Liq. Auth.*, 21 N.Y.2d 778 [288 N.Y.S.2d 474, 235 N.E.2d 447]). The fact that a defendant in a civil suit assumes a substantial risk when he chooses to assert his privilege does not, however, mean



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that the plaintiff is relieved of his obligation to prove a case before he becomes entitled to a judgment."³

The fact that a litigant might be forced to elect "between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination."

Common Sense Must Prevail

In a perfect world, each crime would be documented like a *CSI* episode. The Appellate Division, mindful that a typical defendant will not verify the details of her criminal wrongdoing, mandates that a trial court take a common sense view of the evidence and avoid a Pollyanna perspective on the nature of criminal matters generally, especially in light of the Fifth Amendment obstacle.

In the context of this type of claim, where fraud or illegality is likely to be involved, transactions such as those outlined above "must be judged not

with clinical detachment but with a common sense view to the realities of normal life" (*Wilson v. Attaway*, 757 F.2d 1227, 1235 [11th Cir.1985], *rehg denied* 764 F.2d 1411; *see also, United States v. \$5,644,540.00 in U.S. Currency*, 799 F.2d 1357, 1363 [9th Cir.1986] [where drug trafficking was alleged, court considered aggregate of facts in light of "common experience considerations" "in finding that civil forfeiture was warranted"], and "[p]articularly in cases involving bank accounts, money or other fungible assets, the only proof demonstrating probable cause is likely to be circumstantial, revealing unexplained wealth in conjunction with evidence of [illegality]" (*United States v. All Right Title and Interest*, 983 F.2d 396, 405 [2d Cir.1993], *cert denied sub nom Beckford v. U.S.*, 508 U.S. 913, 113 S.Ct. 2349, 124 L.Ed.2d 258) [emphasis added].⁴

In this regard, at the summary judgment stage of civil proceedings, the court is required to bear in mind that

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that a litigant's Fifth Amendment invocation is a two-fold strategy: first it hopes to avoid criminal consequences and second, it is a simultaneous barrier to the production of testimony which is fatal to her civil defense.

Accordingly, it is proper to infer that defendant withheld evidence regarding the source of the funds deposited in the bank accounts not only because it would have incriminated her, but also would have been unfavorable to her in this action [emphasis added].⁵

The Adverse Inference

Accordingly, once the Fifth Amendment invocation has been documented, adverse counsel can request that the trial court draw an adverse inference from the defendant's refusal to answer relevant questions⁶ pursuant to New York Pattern Jury Instruction

1:76, which provides:

From the assertion of the privilege you may infer, if you deem it proper to do so, that had the answers been given they would not have contradicted the opposing evidence on the issue of [identify issue] or would not have supported (the defendant's, plaintiff's) position on that issue and you may, although you are not required to, draw the strongest inference against the (plaintiff, defendant) on that question that the opposing evidence permits [emphasis added].

It has been observed that "[a] court may draw an adverse inference against a party who asserts his Fifth Amendment privilege in a civil matter, because the invocation of the privilege results in a disadvantage to opposing parties by keeping them from obtaining

information they could otherwise get"⁷ and that an adverse inference may "be given significant weight because silence when one would be expected to speak is a powerful persuader."⁸

The Summary Judgment Motion

But the heavy lifting is not complete upon the Fifth Amendment invocation because the adverse inference may not be the sole basis for liability.⁹ At that point, the movant still bears the burden of laying bear the proof warranting summary judgment sufficient to convince the court that the same, in light of the application of the negative inference, is appropriate. Movant's counsel must bear in mind that the typical admissions gathered at a party deposition will not exist in light of the Fifth Amendment obstacle. However, movant's presentation of all other indicia of wrongdoing, even if purely circumstantial, may nonetheless be characterized by the Court as compelling, and sufficient to warrant summary judgment.

Counsel will be faced with obstacles in the vast majority of highly contested litigations; tenacious attorneys will nonetheless achieve success by identifying a viable strategy no matter the legal dilemma. The interaction between civil and criminal proceedings may reveal challenging circumstances, but with the proper legal strategy designed to address those unique challenges, success in the civil arena can be achieved.

Note: Leo K. Barnes, a member of BARNES & BARNES, P.C. in Melville, can be reached at LKB@BARNESPC.COM

¹ *United States v. Rylander*, 460 U.S. 752, 761, 103 S.Ct. 1548 (1983) ("the claim of privilege is not a substitute for relevant evidence"). *See also United States v. Taylor*, 975 F.2d 402, at 404 (7th Cir. 1992).

² *State of New York v. Carey Resources*, 97 A.D.2d 508, 509, 467 N.Y.S.2d 876 (2nd Dep't 1983). *See also Stuart v. Tomasino*, 148 A.D.2d 370, 373, 539 N.Y.S.2d 327 (1st Dep't 1989).

³ 24 N.Y.2d 354, at 365 (1969) *re-argument denied*, 24 N.Y.2d 1038 (1969).

⁴ *Williams v. Florida*, 399 U.S. 78, at 83-84, 90 S.Ct. 1893 (1893).

⁵ *Republic of Haiti v. Duvalier*, 211 A.D.2d 379, at 385-386, 626 N.Y.S.2d 472, at 476 (1st Dep't 1995).

⁶ *Id.*, at 386.

⁷ *Marine Midland Bank v. John E. Russo Produce Co., Inc.*, 50 N.Y.2d 31, at 42-43 (1980).

⁸ *SEC v. Susman*, 2010 WL 532060, at *5 (S.D.N.Y. Feb. 11, 2010) (internal citation omitted); *see also Commodity Futures Trading Comm'n v. Int'l Fin. Servs.*, 323 F.Supp.2d 482, 505 (S.D.N.Y.2004) ("because Robinson [defendant] asserted his Fifth Amendment privilege ... at his deposition, in evaluating the Commission's [plaintiff] evidence, the court may draw an adverse inferences from his silence.").

⁹ *LiButti v. United States*, 178 F.3d 114, 120 (2nd Cir. 1999).

¹⁰ *See In re Jacobs*, 394 B.R. 646, at 663 (E.D.N.Y. 2008).