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Introduction

Corporations often face multiple legal actions arising out of the conduct of their employees. The same conduct that subjects a corporation to potential civil liability may also expose the corporation, and its employees, to criminal prosecution by any number of federal and state government authorities. One important issue raised by these so-called "parallel proceedings" is how to protect the corporation's interests when one or more of its employees is the subject or potential subject of a criminal investigation and invokes the Fifth Amendment privilege against self-incrimination in a civil suit in which the corporation is a party. It is clear that, under certain circumstances, an employee's refusal to testify based on the privilege can be used as evidence of the corporation's liability in the civil action. This bulletin discusses the law on this issue, and suggests strategies for the corporation facing legal attacks on multiple fronts.

The Fifth Amendment

The Fifth Amendment to the United States Constitution guarantees that no person shall be compelled to give self-incriminating testimony. The privilege can be asserted in any civil, criminal, administrative or judicial proceeding. It also applies in the investigative, as well as the adjudicative stage of these proceedings.¹ While the privilege applies only to individuals, not corporations,² corporations act through their individual employees. An employee, who may also face personal criminal liability, thus faces a dilemma when called to testify in a civil suit involving his or her employer. The employee's voluntary testimony as to incriminating facts will "waive his privilege with respect to those facts and the details thereof."³ Government prosecutors could then use the testimony in a subsequent criminal action against the employee.⁴ Not surprisingly, employees facing this dilemma often choose, absent immunity, to claim the privilege when called to testify in the civil suit against their employer.

The Adverse Inference

When an individual asserts the Fifth Amendment privilege in a civil action, opposing counsel may inform the jury of the invocation, and it is within the court's discretion to permit the fact finder (whether judge or jury) to "infer by such refusal that the answers would have been adverse to the

witness' interest." ⁵ This adverse inference may be drawn based on a witness' assertion of the privilege in a wide array of civil proceedings, including general civil litigation, ⁶ administrative adjudications, ⁷ and in civil forfeiture matters. ⁸

The assertion of the Fifth Amendment need not occur at trial. It may also occur at other stages of a civil proceeding - a party or witness may refuse to answer discovery or may refuse to testify in a hearing for injunctive relief or for a dispositive pre-trial motion. ⁹ Whatever the context in which it occurs, the invocation of the privilege can be used, assuming certain requirements are met, as evidence against the witness and, as discussed below, his or her employer.

Judicial Guidelines for Allowing the Inference

The general rule is that it is within a court's discretion as to whether to admit a witness' invocation of the Fifth Amendment into evidence in a civil action. "[T]he overarching concern" which governs this decision "is fundamentally whether the adverse inference is trustworthy under all of the circumstances and will advance the search for the truth." ¹⁰ Even if the court finds the invocation admissible as trustworthy evidence, it must still determine whether the probative value of the evidence outweighs its prejudicial effect on the fact finder. ¹¹

1. Admissibility

To assess trustworthiness or admissibility, courts will look initially at whether the witness is a party or non-party. If a party, it is well settled that the invocation is admissible against that party. ¹² This is true even where criminal proceedings are pending or might be brought against the defendant claiming the privilege. ¹³ If both the individual and the corporation are parties, the invocation of the privilege may create, under certain circumstances, an adverse inference against both the individual and the corporation. ¹⁴

When the witness is a non-party, however, courts generally engage in a multi-factor, case-by-case analysis to determine whether the adverse interest may be drawn against a party related to the non-party. This area of law is still developing, ¹⁵ but a number of circuits have spoken on the issue. ¹⁶ The Second Circuit recently listed the following non-exclusive factors for assessing admissibility:

- The nature of relevant relationships;
- The degree of control held by the party over the non-party witness;
- The compatibility of the interest of the party and non-party witness in the outcome of the litigation; and
- The role of the non-party witness in the litigation. ¹⁷

These issues arise most often when the non-party witness is a former employee of the party.

Nature of Relevant Relationships

Courts do recognize that a former employee may have an incentive to imply falsely through invocation of the privilege to have engaged in criminal conduct for which the defendant employer would be liable. ¹⁸ In cases where the employer can establish

that the former employee has an ax to grind, courts appear to be less likely to allow an adverse inference against the employer based on the former employee's invocation of the privilege. The court looks for signs that the former employee retains some loyalty to his former employer as an indication that he is justifiably invoking the Fifth Amendment. The fact that the employer is paying for the former employee's attorney for example, is evidence that there is a positive relationship - or at least not a negative one - between the employer and former employee.¹⁹ Other factors such as blood relationships, personal friendships, ongoing business relationships, and legal relationships also may be factors that would make it less likely that the non-party witness would testify falsely.²⁰

Degree of Control

A number of courts have analyzed employee refusals to testify based on the privilege as vicarious admissions against the employer.²¹ Such admissions are admissible pursuant to various jurisdictions' rules of evidence, such as Federal Rule of Evidence 801(d)(ii)(D), which excepts from hearsay a statement offered against a corporate party and made by its "agent or servant concerning a matter within the scope of his agency or employment... during the existence of their relationship..." If the party vested the non-party with control over key facts and the general subject matter of the litigation, it is likely that this degree of control will be sufficient to allow the adverse inference.²²

The witness' status as a former employee will not preclude evidence of his or her invocation of the Fifth Amendment.²³ If the former employee's assertion of the privilege relates directly to the facts at issue in the case, it is admissible.²⁴ In *Brink's Inc. v. City of New York*, the company was accused of negligence relative to its employees' theft of parking meter revenues. The court allowed the adverse inference to be applied to the claim of privilege asserted by the non-party former employees because the question that triggered the claim related to the employees' work.²⁵

Compatibility of Interest of Party and Non-Party Witness

*The court in LiButti v. United States instructed that "[t]he trial court should evaluate whether the non-party witness is pragmatically a non-captioned party in interest and whether assertion of the privilege advances the interests of both the non-party witness and the affected party in the outcome of the litigation."*²⁶ This factor naturally requires an analysis of the relationship between the non-party and the party and the degree of control of the party over the non-party.

Role of Non-Party Witness in Litigation

*If the non-party witness played a key or controlling role in any of the underlying events or the litigation itself, the court will consider that fact in evaluating whether to allow the adverse inference.*²⁷ The ultimate consideration, however, is "whether the adverse inference is trustworthy under all of the circumstances and will advance the search for the truth."²⁸

Weight of the Inference

Admissibility, of course, is not the end of the story. Courts have imposed limitations on the weight accorded the adverse inference. Assertion of a claim of privilege does not prevent an adverse finding or even summary judgment if other evidence supports such a finding and if the litigant does not present sufficient evidence to satisfy his evidentiary burden.²⁹ In other words, a "party who asserts the privilege against self-incrimination must bear the consequence of lack of evidence."³⁰ If a party seeks to withdraw the privilege, courts will allow the withdrawal unless the court believes that opposing parties have suffered undue prejudice from the prior decision to invoke the privilege.³¹ If, however, the court determines that invocation of the Fifth Amendment privilege was done to abuse or obstruct the discovery process, then the court may adopt remedial measures or impose sanctions to prevent prejudice to opposing parties.³² The remedial measures may include barring testimony about matters previously hidden from discovery through invocation of the privilege.³³

The adverse inference, however, is "not sufficient by itself to meet an opponent's burden of proof."³⁴ Indeed, an adverse inference should be drawn only if other probative evidence of the issue at stake exists.³⁵ Not surprisingly, courts have been reluctant to force a party to choose between self incrimination in a criminal case and losing a civil case at the summary judgment stage. Allowing summary judgment in such a situation, based solely on the adverse inference, has been construed to be a violation of the defendant's Fifth Amendment protection.³⁶

Rule 403 Prejudice

Even if a court concludes that the invocation is admissible, the judge may exclude it if the prejudicial effect of such evidence substantially outweighs its probative value.³⁷ Despite the powerful impact that a witness' recitation of the Fifth Amendment may have on a jury, however, the majority rule is that the prejudicial effect in the abstract is not sufficient to exclude evidence that the witness exercised his or her Fifth Amendment right.³⁸ The principal exceptions to this general rule occur when the evidence of the invocation is unduly emphasized by one of the parties when considered in relation to other key evidence introduced at trial or when it is suggested to the jury that they should base their entire decision solely on the exercise of the privilege.³⁹

Strategies

A corporation's strategies for addressing the host of problems raised by an employee's assertion of the Fifth Amendment in a civil action will vary depending on the nature of the case, and also on the stage of the lawsuit in which the privilege is asserted. Nevertheless, the following guidelines may be useful:

1. Recognize the Conflict and Inform the Employee

As an initial matter, the corporate employer must recognize its potential conflict with an employee whose conduct is the basis for potential civil or criminal liability

for the corporation and the individual employee. Counsel performing internal investigations for the employer should inform employees who are interviewed or otherwise involved in the investigation that they represent the company, that the attorney client privilege is the company's privilege, and that the company may waive it. Failure to do so can create the risk of disqualifying the company's counsel and impeding representation of the company's interest.

If the person invoking the privilege is a former employee, the company should consider what evidence it has that the former employee may be using the privilege to retaliate against his former employer. In addition, the company can avoid application of the adverse inference against it by showing that there is no ongoing relationship between the former employee and the company, that the company no longer has any control over the former employee, that the company's interests and those of the former employee are diverse, and that the former employee did not play a key or controlling role in the underlying events.

2. Aggressively Manage Discovery

Once a civil lawsuit has commenced against a backdrop of potential criminal liability, it is imperative for the corporation to prepare for and manage the discovery process aggressively. Employees represented by independent counsel are likely either to refuse to answer discovery requests, or to seek a protective order preventing discovery based on the assertion of the Fifth Amendment. The completion of an exhaustive internal inquiry prior to discovery will provide the corporation with critical information - i.e. what the employee's testimony would likely be and what evidence contrary to the inference can be used to argue that an inference is inappropriate. The corporation also should establish whether there is any probative evidence aside from the adverse inference. Without that additional evidence the adverse inference generally will not be drawn.

3. Consider Seeking a Stay of the Civil Action

The employer (or the employee) may also seek to stay the civil action in light of a pending and related criminal matter. Stays, however, are granted only rarely, and usually only if a defendant can demonstrate that parallel civil and criminal actions involve substantially the same facts, and staying the civil action is not likely to harm the public interest.⁴⁰ Courts generally find that the public interest and the interests of private plaintiffs trump the defendant's concerns against adverse inferences being drawn in a civil case. While obtaining a stay is a difficult task, it is available under appropriate, but limited circumstances.⁴¹

4. File a Pre-trial Motion to Exclude the Evidence.

Assuming that a stay is not granted, an employer should seek to exclude evidence of an employee's invocation of the Fifth Amendment by a pre-trial motion or a motion in limine at trial. The motion should argue that the evidence is not admissible because it is untrustworthy, and that its prejudicial effect outweighs its

probative value. If the evidence is in fact admitted at trial, the final step is to request that the court instruct the jury that it may, but need not, draw the adverse inference.⁴² Such an instruction allows the jury to reject the adverse inference.

Conclusion

While parallel, civil and criminal proceedings pose a serious challenge to corporations with employees facing criminal liability, there are steps that a corporate employer can take to protect its interests in the civil action in which such employees may be called as witnesses. Recognizing the potential conflict between employer and employee and initiating an exhaustive internal investigation at an early stage are crucial. Although it may not assure success, an aggressive approach to controlling discovery and seeking pre-trial relief, such as obtaining a stay of the civil action, is also important. Finally, an informed analysis of the complex factual, tactical and legal issues must be undertaken as early as possible in the process to better meet the challenge of a potential civil trial in which the company's employees assert their Fifth Amendment right not to testify.

¹ See *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977); *Kastigar v. United States*, 406 U.S. 441 (1972).

² *Curcio v. United States*, 354 U.S. 118 (1957).

³ *In re Standard Financial Management*, 76 B.R. 864, 865 (Bankr. D. Mass. 1997) (citing *Rogers v. United States*, 340 U.S. 367, 71 S. Ct. 438, 95 L. Ed. 344 (1951)).

⁴ See *Mid-America's Process Service v. Ellison*, 767 F.2d 684, 686 (10th Cir. 1985).

⁵ *Brink's Inc. v. City of New York*, 717 F.2d 700, 707 (2d Cir. 1983); see also *Baxter v. Palmigiano*, 425 U.S. 308 (1976); *National Acceptance Co. of America v. Bathalter*, 705 F.2d 924, 929 (7th Cir. 1983) (stating that "after Baxter there is no longer any doubt that at trial a civil defendant's silence may be used against him, even if that silence is an exercise of his Constitutional privilege against self-incrimination"); *United States v. Lileikis*, 899 F. Supp. 802, 804 (D. Mass. 1995).

⁶ See *Brinks*, 717 F.2d at 708 (allowing adverse inference to be drawn against corporation in civil proceeding for theft by its employees).

⁷ See *Keating v. Office of Thrift Supervision*, 45 F.3d 322 (9th Cir. 1995) (permitting inference to be drawn in Office of Thrift Supervisor enforcement matter).

⁸ See *United States v. Two Parcels of Real Property*, 92 F.3d 1123 (11th Cir. 1996).

⁹ See *National Acceptance Co.*, 705 F.2d at 927.

¹⁰ *LiButti v. United States*, 107 F.3d 110, 124 (2d Cir. 1997).

¹¹ See *id.* at 124; *Brinks*, 717 F.2d at 710.

¹² See *Baxter*, 425 U.S. at 316-20; *FDIC v. Elio*, 39 F.3d 1239, 1248 (1st Cir. 1994); *Quintal v. Commissioner of Dept. of Employment and Training*, 418 Mass. 855, 861 (1994).

¹³ See *McGinnis v. Aetna Life & Cas. Co.*, 398 Mass. 37, 39 (1986). If, however, a claimant in a civil case is also a defendant in a criminal case, an adverse inference may not be taken when the claimant is forced to choose between waiving the privilege

and losing the case on summary judgment. See *Two Parcels of Real Property*, 92 F.3d at 1129.

¹⁴ See *Veranda Beach Club, L.P. v. Western Surety Co.*, 936 F.2d 1364, 1374 (1st Cir. 1991).

¹⁵ See *LiButti*, 107 F.3d at 120 (noting the "undeveloped posture of the law pertaining to adverse inferences when non-party witnesses invoke the Fifth Amendment in civil litigation").

¹⁶ See e.g., *FDIC v. Fidelity and Deposit Co.*, 45 F.3d 969, 977-78 (5th Cir. 1995) (endorsing case by case analysis; rejecting rule that would bar party from calling non-party witness who had no special relationship to party, merely for the purpose of having that witness exercise his Fifth Amendment right); *Cerro Gordo Charity v. Firemen's Fund Am. Life Ins. Co.*, 819 F.2d 1471, 1481 (8th Cir. 1987) (adopting factor-based case-by-case analysis); *RAD Services, Inc. v. Aetna Cas. & Sur. Co.*, 808 F.2d 271, 275 (3rd Cir. 1986) (holding that mere fact that witness no longer works for corporate party should not preclude evidence of his invocation of the Fifth Amendment). *Rosebud Sioux Tribe v. A&P Steel, Inc.*, 733 F.2d 509 (8th Cir. 1984) (noting that circumstances of a given case, rather than a bright line rule, should govern the admissibility of adverse inferences in civil actions).

¹⁷ See *LiButti*, 107 F.3d at 123.

¹⁸ See *RAD Serv., Inc.*, 808 F.2d at 276.

¹⁹ See *id.*

²⁰ See *LiButti*, 107 F.3d at 123; *In re Adler Coleman Clearing Corp.*, 1998 WL 182808 (Bankr. S.D.N.Y. Apr. 17, 1998).

²¹ See e.g. *Brink's*, 717 F.2d at 710.

²² See, *In re Adler*, 1998 WL 182808 at 8.

²³ See *RAD Serv., Inc.*, 808 F.2d at 275.

²⁴ See *U.S. v. District Counsel of New York City and Vicinity*, 832 F. Supp. 644, 652 (S.D.N.Y. 1993). See also *Brink's Inc.*, 717 F.2d at 710; *Cerro Gordo*, 819 F.2d at 1482.

²⁵ *Brink's*, 717 F.2d at 710.

²⁶ *LiButti*, 107 F.3d at 123.

²⁷ *Id.* at 123.

²⁸ *Id.* at 124 (citing *Idaho v. Wright*, 497 U.S. 805, 819, 110 S. Ct. 3139, 3148, 111 L. Ed. 2d 638 (1990)).

²⁹ See *United States v. 4003-4005 5th Avenue*, 55 F.3d 78, 83 (2d Cir. 1995).

³⁰ *United States v. Taylor*, 975 F.2d 402, 404 (7th Cir. 1992).

³¹ See *4003-4005 5th Ave.*, 55 F.3d at 84.

³² See *id.* at 84-85.

³³ See *id.* at 85.

³⁴ *Custody of Two Minors*, 396 Mass. 610, 616 (1985); *Frizado v. Frizado*, 420 Mass. 592, 596 (1995).

³⁵ See *Hasbro, Inc. v. Serafino*, 958 F. Supp. 19, 25 (D. Mass. 1997).

³⁶ *LaSalle Bank Lake View v. Seguban*, 54 F.3d 387, 391-92 (7th Cir. 1995) (emphasizing that adverse interest alone cannot support summary judgment);

Securities Exchange Commission v. Graystone Nash, Inc., 25 F.3d 187, 191 (3d Cir. 1994)(reviewing case law on this subject and concluding that preventing party from opposing summary judgment was too draconian a sanction); United States v. Premises, 946 F.2d 749, 756 (11th Cir. 1991) (finding against party on summary judgment due to invocation of privilege violates the Fifth Amendment if invocation deprives party of any defense to summary judgment, not just best one).

³⁷ See e.g. FRE 403; LiButti, 107 F.3d at 124.

³⁸ See Brink's, Inc., 717 F.2d at 710; Cerro Gordo, 819 F.2d at 1482.

³⁹ Cerro Gordo, 819 F.2d at 1482.

⁴⁰ See SEC v. Dresser Industries, Inc. 628 F.2d 1368, 1376 (D.C. Cir. 1980).

⁴¹ As noted by Judah Best and D. Annette Fields in The Practitioners Guide to Parallel Proceedings, in Internal Corporate Investigations: Conducting Them, Protecting Them (Section of Litigation, American Bar Association, Brad D. Brian and Barry F. McNeil eds., 1992), factors which support the granting of a stay include: (1) the actual indictment of the defendant seeking a stay; (2) the civil and criminal actions involve the same issues, but the civil suit is not an enforcement action brought by the government; and (3) the relief requested is narrow, e.g. postponing discovery for a limited time, as opposed to staying the entire action. See e.g. RAD Serv., Inc., 808 F.2d at 279 n.3; United States v. Certain Real Property, 751 F. Supp. 1060 (E.D.N.Y. 1989); Brock v. Tolkow, 109 F.R.D. 116 (E.D.N.Y. 1985).

⁴² See Brinks, Inc., 717 F.2d at 707

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