

Hobson's Choice – Assertion of Fifth Amendment in Civil/Criminal Proceedings

By Craig S. Denney

One of the most difficult decisions for counsel to make in litigation is whether or not a client should invoke the Fifth Amendment privilege against self-incrimination. There are allegations of fraud tossed about in civil lawsuits on a regular basis. On occasion, the allegations may rise to the level for counsel to assess whether testimony at a deposition may expose the party to potential criminal prosecution. This is a decision point for counsel.

The Fifth Amendment privilege may be asserted in criminal and civil proceedings.¹ The decision on whether or not to “take five” in civil litigation should not be made lightly. If there is a pending criminal investigation (or parallel proceeding), the client may have no choice but to assert the privilege to avoid incriminating himself. If the client is the plaintiff or defendant in civil litigation, the assertion of the privilege can be devastating to the case. Unlike in criminal proceedings where the invocation of the Fifth Amendment cannot be used as evidence of guilt, the opposite is true in civil proceedings where the adverse inference can be raised and considered in evidence.

In a recent decision by the Nevada Supreme Court, the court found that abuse of the Fifth Amendment privilege can result in summary judgment. In *Francis v. Wynn Las Vegas, LLC*, a party in a civil lawsuit involving a significant debt owed to a casino, repeatedly asserted the Fifth Amendment in his deposition testimony.² There was a pending criminal investigation by the local district attorney during the civil litigation. The plaintiff (debtor) opted to invoke his constitutional right against self-incrimination on practically every single question posed by opposing counsel at the deposition (including innocuous questions like “what is your father’s name?”).³ The district court found this abusive tactic improper



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and granted summary judgment for the casino on all claims and counterclaims. The judge criticized the defendant’s conduct as “the most ridiculous exercise of the 5th Amendment I think I’ve ever seen.”⁴ On appeal, the Supreme Court agreed with the district court and found defendant’s assertion of the privilege was “overbroad” and affirmed the summary judgment.⁵

Counsel should consider alternatives to blanket or incessant assertion of the Fifth Amendment in civil proceedings. One viable option is to seek a stay of the civil proceedings until resolution of the criminal investigation. The stay can be indefinite or limited duration.⁶ Another option is to seek a protective order or to limit the scope of the questioning at the deposition. Still another option would be to stay the defendant’s deposition as opposed to the entire civil litigation itself.⁷

If there is a pending criminal indictment, it should be of no surprise that opposing counsel may wish to cross-examine the defendant during the deposition about the facts and circumstances that relate to the criminal case in an attempt to “dirty up” the defendant in the civil litigation. Counsel must be vigilant to avoid having the witness incriminate himself if there is a pending criminal case or exposure to one by admissions of fraud.

Courts are cognizant of a person’s constitutional rights (i.e. presumption of innocence) and will not allow attorneys to abuse a defendant in civil proceedings if there is a valid concern about self-incrimination (i.e. provide a link in the chain to prosecution). Due to the fact that criminal cases typically proceed more quickly than civil litigation (due to the discovery process), courts may grant stays of civil proceedings in order to allow the criminal case to run its course. If there is no indictment pending, the courts may scrutinize the motion to stay to ensure that the civil case is not indefinitely delayed by the specter of a possible criminal prosecution.

There are various factors a court will consider and balance in deciding whether or not to grant a stay in a civil case when there are related criminal proceedings: (1) the extent to which the issues in the criminal case overlap with the civil case; (2) the status of the case, including whether there is an indictment;⁸ (3) the interests of the parties opposing the stay in proceeding expeditiously weighed against prejudice caused by delay; (4) the interests and burden on the party seeking the stay; (5) the interests of the courts; and (6) the public interest.⁹

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There is no bright line rule. Federal and state decisions go both ways in granting or denying stays of civil litigation for pending criminal cases of related conduct.¹⁰ The prudent course of action for counsel is to evaluate and then pursue reasonable alternatives to having the client repeatedly assert the Fifth Amendment in a deposition. The consequences of blanket assertions of the privilege against self incrimination may have a devastating impact on civil litigation. Likewise, failure to assert the privilege in a timely manner may result in providing damaging evidence that can be used in a criminal prosecution that carries even more adverse consequences, including conviction and imprisonment.

Endnotes

- ¹ *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977).
- ² *Francis v. Wynn Las Vegas, LLC*, 127 Nev., Adv. Op. 60 (2011).
- ³ *Id.* at 4-5.
- ⁴ *Id.* at 6.
- ⁵ *Id.* at 11.
- ⁶ See, e.g., *Securities and Exchange Commission v. Doody*, 186 F. Supp. 2d 379 (S.D.N.Y. 2002) (awarding a four week stay of only some aspects of discovery).
- ⁷ *Securities and Exchange Commission v. Control Metals Corp.*, 57 F.R.D. 56 (S.D.N.Y. 1972) (staying the taking of certain depositions).
- ⁸ See, e.g., *Baranski v. Fifteen Unknown Agents of ATF*, 195 F. Supp.2d 862, 870 (W.D. Ky. 2002) (“[T]he case for staying civil proceedings is ‘a far weaker one’ when ‘[n]o indictment has been returned.’”)
- ⁹ *Trustees of the Plumbers and Pipefitters Nat’l Pension Fund v. Transworld Mechanical, Inc.*, 886 F. Supp. 1134, 1138-39 (S.D.N.Y. 1995).
- ¹⁰ *Campbell v. Eastland*, 307 F.2d 478 (5th Cir. 1962)(explaining that while “[i]n some situations it may be appropriate to stay the civil proceeding...In others it may be preferable for the civil suit to proceed – unstayed.”); *United States v. One 1967 Ford Galaxie*, 49 F.R.D. 295 (S.D.N.Y. 1970) (denying stay of civil litigation pending disposition of criminal charges); *United States v. One 1964 Cadillac Coupe de Ville*, 41 F.R.D. 352 (S.D.N.Y. 1966) (stating that “the United States in civil cases should not be permitted to ignore the Federal Rules of Civil Procedure simply because a criminal action involving the same questions has been – or may be – instituted.”); *State v. Spicer*, 1999 WL 458771 (Del. Super. 1999) (upholding lower court stay of discovery in related state case during defendant’s criminal prosecution).

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and information to be disclosed, as well as certain unintended consequences of the interplay of federal and state discovery practices and rules. At first glance, these special issues present challenges. Properly understood, however, and successfully litigated, these issues may be seized upon by the savvy defense practitioner to turn the tables on the government and obtain a better result for his or her client.

Endnotes

- ¹ *United States v. Antone*, 603 F.2d 566, 570 (5th Cir. 1979).
- ² *United States v. Reyerros*, 537 F.3d 270, 281 (3rd Cir. 2008).
- ³ 741 N.E.2d 493 (Ny. App. 2000)
- ⁴ See *United States v. Cerna*, 633 F.Supp.2d 1053 (N.D. Cal. 2009).
- ⁵ See *United States v. W.R. Grace*, Case No. CR-05-07-M-DWM (D.Mt. Order April 28, 2009); *United States v. Welton*, Case No. CR-09-00153, 2009 U.S. Dist. LEXIS 71509 (C.D. Cal. Aug. 1, 2009); *United States v. Buske*, Case No. 09-CR-65, 2011 U.S. Dist. LEXIS 77842 (E.D. Wisc. July 18, 2011).
- ⁶ *Raynor v. Maryland*, No. 1629, 2011 Md. App. LEXIS 128 (Md. App. Sept. 29, 2011).

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