

THE FIFTH AMENDMENT AND CIVIL FRAUD CASES

JANUARY 2013

An individual's constitutional right to protection from self-incrimination is among the most important civil liberties. The Fifth Amendment is most notably referenced in criminal matters, but it also applies in civil matters, including bankruptcy proceedings.

Over the past decade, numerous criminal fraud cases have resulted in complimentary bankruptcy proceedings for the entities and individuals involved. Enron, WorldCom, Bernie Madoff, and Agape are but a few and most notable. Oftentimes, a prosecutor, trustee, or creditor seeks to use information obtained in criminal, civil, or bankruptcy proceedings in one or more of the other matters. Because of this, how a defendant, debtor, or other related non-party uses the Fifth Amendment protection is critically important. Consider the following examples of how the Fifth Amendment can affect a party involved in simultaneous or related criminal, civil, and bankruptcy proceedings.

There are three basic prerequisites that a party must establish in order to properly assert the Fifth Amendment protection in a civil proceeding:

- 1) Compelled disclosure
- 2) That is testimonial, and
- 3) Incriminatory.

The purpose of this provision is to shield a party from being required to provide the testimony necessary to establish his or her own guilt.

COORDINATION OF EFFORTS BETWEEN CIVIL AND CRIMINAL COUNSEL

In a situation in which an individual has already plead or been found guilty of a crime, and the testimony sought relates to that prior conviction, the individual may not, in a related bankruptcy case, claim the Fifth Amendment privilege, because "where there can be no further incrimination, there is no basis for the assertion of the privilege." *In re Cassandra Group*, 338 B.R. 600, 604 (Bankr. S.D.N.Y. 2006). As a result of this limitation, the different counsel for a party involved in multiple criminal and civil proceedings must, to a degree, coordinate their efforts in order to prevent action taken in one proceeding from adversely affecting another proceeding.

Production of relevant documents is particularly important in both civil litigation and bankruptcy proceedings, just as it is in criminal fraud cases. The Fifth Amendment can protect a party from having to produce documents if the three basic prerequisites are satisfied. There is, however, an important document production situation that the Fifth Amendment does not cover. Specifically, the Fifth Amendment does not cover the production of documents held by an individual in a representative capacity, as opposed to a personal capacity. *In re Schick*, 215 B.R. 4, 9 (Bankr. S.D.N.Y. 1997). Thus, if an individual is required to testify in his capacity as an officer of a corporation, and as an officer the individual is required to keep certain books and records of the corporation, the officer cannot use the Fifth Amendment protection as a shield to a document

production request. This is the case even if the documents might contain incriminating information about the officer.

ADVERSE INFERENCE IN CIVIL CASES

Perhaps the most important aspect of the Fifth Amendment protection in civil cases is that, unlike in criminal cases, the court may draw an adverse inference based upon a party's use of the Fifth Amendment. In other words, the court may use a party's silence against that party, even when properly asserted under the Fifth Amendment.

However, an adverse inference based on a party's use of the Fifth Amendment cannot serve as the sole basis for a finding liability. See *In re Jacobs*, 394 B.R. 646, 663 (Bankr. E.D.N.Y. 2008). In other words, a "testimonial assertion of the Fifth Amendment is not a substitute for relevant and persuasive evidence," but may still be harmful to a party's cause if not handled with the proper consideration and care. *Id.* Therefore, the civil and criminal attorneys must evaluate the strength of the defense in the civil proceeding. Can the defense be sustained without putting the client on the stand? A classic risks-rewards analysis must be done.