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Fifth Amendment Danger In Civil Cases

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The Fifth Amendment to the U.S. Constitution guarantees that no person "shall be compelled in any criminal case to be a witness against himself." Courts have interpreted that protection to include a prohibition on drawing any adverse inference against a person who refuses to testify in a criminal case based on Fifth Amendment rights. Civil proceedings, however, are a different story—an adverse inference is generally permissible against a civil defendant who invokes the privilege against self-incrimination. But neither counsel nor client has any control over whether *another* witness or co-defendant invokes the privilege against self-incrimination, and surprising results can occur when they do.

Practitioners should be aware of the risk that courts will permit an adverse inference against their client in a civil case based on another person's invocation of their right not to testify, even when the client has not invoked. Several federal appellate courts have permitted adverse inferences to be used in this manner, including against employer entities when non-party ex-employees invoke the privilege. Counsel should be prepared to challenge such evidence on several grounds, including arguing that the generally-accepted test for application of the adverse inference has not been met, that the evidence constitutes inadmissible hearsay, and that the evidence is more prejudicial than probative and therefore inadmissible under Federal Rule of Evidence 403.

'Brink's' and Former Employees

The U.S. Court of Appeals for the Second Circuit has held that the refusal of an ex-employee to testify is admissible in a civil case to support an adverse inference against a former employer. In this case, the Brink's security company sued the City of New York for money owed under a contract that the City terminated after five Brink's employees were caught stealing money collected from parking meters. Several non-party ex-employees who were convicted after trial or pleaded guilty in separate criminal proceedings invoked the Fifth Amendment on the witness stand during Brink's civil suit. When the City sought an adverse inference against Brink's based on those invocations, the court found that there was no constitutional bar to the application of an adverse inference in this manner. *Brink's v. City of New York*, 717 F.2d 700 (2d Cir. 1983).

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The Second Circuit did not expressly consider whether the invocation by the ex-employees was hearsay. Rather, the court concluded that the invocation was a vicarious admission, citing a law review article arguing that adverse inferences should be permitted in civil cases against employer-defendants when an employee has invoked their Fifth Amendment rights. To address the fact that

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Brink's involved former, not current, employees, the Second Circuit cited a footnote in the law review article which asserted:

That the invoker is no longer the defendant's employee at the time of his invokings need not necessarily bar admitting the invokings as a vicarious admission. The fact of present employment serves primarily to reduce the chance that the employee will falsely claim to have engaged in criminal conduct for which the defendant employer is liable. Any factors suggesting that a former employee retains some loyalty to his former employer—such as the fact that the employer is paying for his attorney—would serve the same purpose.

The Conjurer's Circle: The Fifth Amendment Privilege in Civil Cases, 91 Yale L.J. 1062, 1119-20 n.214 (1982). The Third Circuit (in *Rad Services v. Aetna Cas. & Sur. Co.,* 808 F.2d 271 (3d Cir. 1986)) and the Eleventh Circuit (in *Coquina v. Investments v. TD Bank,* 760 F.3d 1300 (11th Cir. 2014)) have both permitted adverse inferences against a corporate party when former employees invoked Fifth Amendment rights, citing the law review footnote in their opinions.

The vicarious admission theory is flawed. To begin with, corporate parties have little, if any, control over the testimonial actions of current or former employees. Many corporate codes of conduct would likely permit a company to terminate an employee who refuses to testify in response to a lawful request, but companies have no power to compel substantive testimony. Further, the "legal fee loyalty" theory assumes an alignment of interests between the company and current and former employees that may not exist. Corporate parties can be required by state law and/or their charters to pay the legal fees of certain employees regardless of any alignment of interests on the merits of a case, so the payment of fees alone should not be viewed as generating "loyalty" sufficient to support a vicarious admission theory. In addition, an ex-employee may have personal reasons to invoke Fifth Amendment rights in response to questions about their employment that have nothing to do with "loyalty" to their former employer. For example, an ex-employee who submitted a fraudulent personal income tax filing may choose not to answer questions about employment during a civil deposition, particularly where that person is not a party in the civil case. In such situations, the reason for the invocation of the privilege is not necessarily reflective of any wrongdoing in the course of employment. Moreover, the question of whether an invocation constitutes a vicarious admission must be answered at the time of the invocation, requiring analysis of the relationships and motives of the parties at that time, not based on historical employment relationships and motives, which may well be different.

The 'LiButti' Factors

Courts have also permitted an adverse inference outside the employment context, based on the close nature of the relationship between the non-party invoking the privilege and the defendant in a civil case. In *LiButti v. U.S.*, 107 F.3d 110 (2d Cir. 1997), the court established a widely followed framework to evaluate the adverse inference issue. In that case, the U.S. government brought an action against Edith LiButti seeking to impose a tax lien against a racehorse, claiming that the horse was owned not by Ms. LiButti, but by an entity jointly owned with her father, Robert LiButti, who had been convicted of tax fraud. Although Robert was not a party in the case against his daughter, he was deposed and invoked his Fifth Amendment rights in response to questions concerning the horse.

The court established four factors for evaluating whether an adverse inference can be drawn against a party based on a third-party's refusal to testify: (1) the nature of the relevant relationship, (2) the degree of control of the party over the non-party witness; (3) the compatibility of the interests of the party and non-party witness in the outcome of the litigation; and (4) the role of the non-party witness in the litigation. The court found that an adverse inference from Robert LiButti's invocation of the privilege was admissible against his daughter based on the strength of their familial relationship and their united interests in keeping the horse free of a tax lien.

The Second Circuit emphasized, however, that it was not establishing a blanket rule that third-party assertions of testimonial privilege are admissible in all instances, which provides counsel the opportunity to argue that one or more of the *LiButti* factors have not been met in their case. Because the court concluded that the father had used his daughter as a "nominee" to shield assets from taxation, it is perhaps not surprising that the court found that a close familial relationship supplied the requisite control to permit an adverse inference against the daughter. But the unusual facts that appeared to drive the decision in *LiButti* will not be present in most cases.

Civil Co-Defendants

Moving beyond the father-daughter relationship in *LiButti*, other courts

have permitted adverse inferences against parties that did not invoke the privilege based on relationships that are remarkably thin. In one such case, defeated candidates in a primary election sued two employees of the Albany Housing Authority (AHA) and the Albany Board of Elections, alleging that the AHA employees engaged in a scheme to improperly harvest and complete absentee ballots in connection with a special election. One of the AHA defendants, Jamie Gilkey, invoked his Fifth Amendment rights in his deposition. In deciding competing motions for summary judgment, the magistrate judge considered whether an adverse inference was permissible against the other AHA defendant—Tyler Trice—and the Board of Elections. *Willingham v. Cty. of Albany*, 593 F. Supp. 2d 446, 453 (N.D.N.Y. 2006).

Analyzing the *LiButti* factors, the court rejected the attempt to apply an adverse inference against the Board of Elections, finding that Gilkey and the Board of Elections had no formal or informal relationship, and at worst the Board failed to investigate or prevent Gilkey's absentee ballot abuses, but not that it participated in any such actions. Surprisingly, however, the court did find that an adverse inference from Gilkey's refusal to testify could be applied against co-defendant Trice. Although the court acknowledged there was no evidence that Trice exercised any control over Gilkey's actions, it found that Trice and Gilkey "appear[] to have been close politically and through their employment," and that Trice had accompanied Gilkey to solicit absentee ballot applications at Gilkey's request. The court concluded that "it appears throughout the underlying events and the course of this litigation that Trice has accepted and followed Gilkey's leadership and actions and joined with Gilkey." Remarkably, the court even cited the fact that both defendants had asserted joint defenses in their answers to the complaint.

Hearsay Considerations

Another threshold question that inexplicably has not seemed to trouble the courts is whether an invocation by a witness other than the defendant constitutes inadmissible hearsay. The hearsay issue seems unavoidable. For an adverse inference to have any weight, the invocation would seem to be offered for the truth of the matter asserted, that is, "I refuse to answer the question on the ground that it may tend to incriminate me." The non-hearsay provisions of FRE 801(d)(1) and 801(d)(2)(a) do not apply because the declarant-invoker is not same person as the defendant.

> Counsel should oppose admission of the evidence under the 'LiButti' factors, seek to preclude the evidence as inadmissible hearsay, argue that the evidence is more prejudicial than probative under FRE 403, and, if all those efforts are unsuccessful, be on the lookout for abuse in presentation of the evidence.

Absent unusual circumstances, the provisions of FRE 801(d)(2), an opposing party's statement, also do not apply. The defendant will not have manifested that it adopted or believed the invocation to be true. FRE 801(d)(2)(b). The declarant-invoker is not a person whom the defendant will have authorized to make the invocation. FRE 801(d)(2)(c). Other than potentially in the employer-employee context, the invocation will not have been made by the party's agent or employee on a matter within the scope of that relationship and while it existed. FRE 801(d)(2)(d). On this issue, it is not apparent why an employee should automatically be considered an agent of the employer when the employee invokes the Fifth Amendment to protect the employee's personal interests during testimony in an investigative or litigation forum. For a former employee, contrary to the conclusion of the law review article referenced above, it is even less likely that an agency relationship still exists with the employer at the time of testimony. Finally, absent specific proof in the unusual case, the invocation will not have been made by the defendant's coconspirator during and in furtherance of a conspiracy. FRE 801(d)(2)(e). Further, although our space does not allow for an exhaustive discussion of all potential hearsay exceptions in FRE 803 and 804, there does not appear to be any exception that would permit the invocation and adverse inference to be admitted against someone other than the individual who invoked.

The admission of invocation evidence also presents challenges regarding the usual instruction to jurors that attorneys' questions are not evidence, only the answers are evidence. Because the questions define the scope of the adverse inference from an invocation, there is a substantial danger that jurors would be permitted, if not invited, to draw invalid inferences when abusive, sweeping questions are posed to witnesses who invoke. A careful witness trying to avoid waiving their Fifth Amendment rights may well

decline to answer repeatedly even when certain questions, if answered substantively, would yield facts that would not support an adverse inference. Judge Winter acknowledged this concern in his well-reasoned dissenting opinion in *Brink's*. 717 F.2d at 716 (noting that once it is clear a witness has invoked, the examiner may feel free "to pose those questions which are most damaging to the adversary, safe from any contradiction by the witness no matter the actual facts."). Unfortunately, as the Second Circuit recently noted, "it was precisely these types of questions—fact-specific, leading questions—that the majority in *Brink's* held were permissible." *Mirlis v. Greer*, 952 F.3d 36, 46 (2d Cir. 2020). At this juncture, it is important to pause and recall the bedrock principle that innocent people can, and do, invoke their Fifth Amendment rights. As the Supreme Court has stated, "we have never held (…) that the [Fifth Amendment] privilege is unavailable to those who claim innocence. To the contrary, we have emphasized that one of the Fifth Amendment's 'basic functions … is to protect innocent men … who otherwise might be ensnared by ambiguous circumstances.'" *Ohio v. Reiner*, 532 U.S. 17, 21 (2001) (citation omitted).

Undue Prejudice Under FRE 403

If the *LiButti* factors are satisfied, and a hearsay objection is not sustained, counsel must then demonstrate that the inference flowing from a third party's invocation is more prejudicial than probative against the defendant, and therefore inadmissible under FRE 403. The Second Circuit in *Brink's* emphasized that "prejudicial" in this context, however, means that the evidence is unduly inflammatory, not whether it has a damning effect on the opposing party's litigation position concerning its knowledge or negligence (which it surely does). The court in *LiButti* likewise noted that after applying the four-factor test, on remand the district court would need to evaluate the relevance of the non-party father's refusal to testify and its probative value under FRE 403, as well as the weight such evidence should be accorded in the context of all other evidence. Thus, when a court permits the introduction of invocation evidence, counsel should consider seeking instructions to the jury limiting the scope and weight of such evidence.

Potential for Abuse

Even when all efforts to preclude invocation evidence have failed, counsel can still mitigate its effect. Because this type of evidence is subject to abusive practices, counsel should monitor how invocation evidence is presented to the jury. In a recent civil forfeiture action, the Second Circuit reprimanded the prosecution for repeatedly presenting videos of former board members of the defendant "declining to answer question after question during their depositions." *In re 650 Fifth Ace. & Related Properties*, 934 F.3d 147, 172 (2d Cir. 2019). The court, which vacated the district judge's order of forfeiture and remanded the case, concluded that the manner in which the government presented the videos, "which the Government strategically spread out across multiple days of trial," was substantially more prejudicial and redundant than probative, in that it "repeatedly reminded the jury of the witness' decisions not to testify. And they repeatedly put the Government's incriminating questions in the jurors' minds—questions that the parties agreed were not evidence and that the court allowed to submit as an exhibit." The court concluded that less prejudicial and redundant alternatives to presenting the evidence were available, such as "a stipulation or a scaled-back showing of the videotapes."

Takeaways

In sum, practitioners should be aware that although civil litigants need to clear a few hurdles to obtain an adverse inference when a non-party or co-defendant invokes their Fifth Amendment rights, those hurdles are not insurmountable. Counsel should oppose admission of the evidence under the *LiButti* factors, seek to preclude the evidence as inadmissible hearsay, argue that the evidence is more prejudicial than probative under FRE 403, and, if all those efforts are unsuccessful, be on the lookout for abuse in presentation of the evidence.