YOU HAVE THE RIGHT TO REMAIN SILENT, SOMETIMES

A Primer on the Scope of the Fifth Amendment in Bankruptcy Proceedings

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Critical to their function, the government and the courts have the power to compel the testimony of witnesses. *See Kastigar v. United States*, 406 U.S. 411, 443-44 (1972). However, the Fifth Amendment of the United States Constitution presents an exception, which provides, in part, "[n]o person shall be . . . compelled in any criminal case to be a witness against himself." USCS Const. Amend. 5. "The Fifth Amendment guarantees against federal infringement – the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

The Fifth Amendment "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *Kastigar*, 406 U.S. at 444-45. These include bankruptcy proceedings.

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McCarthy v. Arndstein, 266 U.S. 34, 39-40 (1924); *Butcher v. Bailey*, 753 F.3d 465, 468 (6th Cir. 1985); *In re Martin-Trigona*, 732 F.2d 170, 175 (2d Cir. 1984); *In re Connelly*, 59 B.R. 421, 430 (Bankr. N.D. Ill. 1986).

The dichotomy of interests presented by the Fifth Amendment's privilege against self-incrimination and the Bankruptcy Code's policy of full disclosure presents unique issues for bankruptcy practitioners, trustees and judges. As aptly stated by the court in *Connelly*, "[w]hen a debtor does assert his constitutional right to 'refuse to testify for fear of self-incrimination, the bankruptcy court's ability to effect a thorough and equitable adjudication is jeopardized.'" *Connelly*, 59 B.R. at 430 (citation omitted). While categorical application of this jurisprudence is difficult due to the fact-specific nature of the analysis and the need to balance the two competing interests, this article highlights some of the overarching principles governing application of the Fifth Amendment in a bankruptcy setting.

I. Relevant Code Sections

Section 521 of the Bankruptcy Code prescribes a debtor's duties and requires the debtor to "file…a list of creditors, and… (i) a schedule of assets and liabilities; (ii) a schedule of current income and current expenditures; (iii) a statement of the debtor's financial affairs," and other information relating to the debtor's finances. 11 U.S.C. §521(a) (2018). Section 521 also requires the debtor to "cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties" and to surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate, whether or not immunity is granted under section 344 of this title." 11 U.S.C. §521(a)(3)-(4). Section 343 commands the debtor to "appear and submit to examination under oath at the meeting of creditors under section 341(a) of this title." 11 U.S.C. §343 (2018).

Section 344 of the Bankruptcy Code, enacted in 1978, provides that "[i]mmunity for persons required to submit to examination, to testify, or to provide information in a case under this title may be granted under part V of title 18 [18 USCS §§ 6001 et seq.]." The legislative history of §344 clarifies that this Code section refers only to "use immunity," not "transactional immunity" and calls its enactment a "significant departure from current law," which required testimony in all circumstances but also provided blanket immunity to all debtors. Nov. 6, 1978, P.L. 95-598, Title I, § 101,92 Stat. 2565, Senate Report No. 95-989.

Included among the exceptions to discharge set forth in §727 is debtors who have "refused, in this case—(A) to obey any lawful order of the court, other than an order to respond to a material question or testify; (B) on the ground of privilege against self-incrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or (C) on a ground other than the properly invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify[.]" 11 U.S.C. §727(a)(6) (2018).[2]

II. Necessary Elements of a Claim for Fifth Amendment Privilege

For the privilege to apply, disclosure must be compelled (physical or morally) from an unwilling witness, the information must be "testimonial" in nature and "incriminatory." *See, e.g., Fisher v. United States*, 425 U.S. 391, 397, 401 (1976); *Couch v. United States*, 409 U.S. 322, 328, 336 (1973). In the case of bankruptcy proceedings, the requirements of the Code themselves constitute compulsion. *See Connelly*, 59 B.R. at 431-32 (citing *Butcher*, 753 F.2d at 469).

With respect to the "testimonial" requirement, a debtor may be giving "testimony" for Fifth Amendment purposes "whether this debtor testifies at a meeting of creditors or other court proceeding or reveals information by filing the required petition, schedules and statement of financial affairs." *Connelly*, 59 B.R. at 432 (citing *McCarthy*, 266 U.S. at 34). However, no privilege may be asserted to protect a debtor from the obligation to turn over property of the estate to the trustee. *See In Re Crabtree*, 39 B.R. 726, 731 (Bankr. E.D. Tenn. 1984) (citing *In re Harris*, 221 U.S. 274, 279 (1911); *Johnson*, 228 U.S. at 458-59; *In re Fuller*, 262 U.S. 91, 93-94 (1923); *McCarthy*, 266 U.S. at 41; *United States v. Sullivan*, 274 U.S. 259, 263-64 (1927)).

A debtor must also demonstrate that the testimony requested has a reasonably likelihood of incrimination, or, as characterized by the Supreme Court, a "reasonable cause to apprehend danger." *Hoffman v. United States*, 341 U.S. 479, 486 (1951). "The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." *Id.* For further analysis, consult the *Hoffman* decision. *Id.* at 485-87. *See also In Re Corrugated Container Antitrust Litigation*, 661 F.2d 1145, 1150 (7th Cir. 1981) *aff'd*, 459 U.S. 248 (1983) (the question involves the possibility, not the likelihood, of prosecution). The debtor's burden in this regard, *inter alia*, prevents a debtor from invoking the Fifth Amendment privilege in blanket fashion. *See Connelly*, 59 B.R. at 433 (citing *Hoffman*, 341 U.S. at 479; *In re Morganroth*, 718 F.2d 161, 167 (6th Cir. 1983)).

As for many of the seemingly innocuous questions interposed by a bankruptcy trustee or parties in interest, "where there is nothing suggestive of incrimination about the setting, . . . the burden of establishing a foundation for the assertion of the privilege should lie with the witness making it." *Morganroth*, 718 F.2d at 169 (citing *United States v. Moreno,* 536 F.2d 1042, 1049 (1976); *United States v. Rosen*, 174 F.2d 187, 188 (2d Cir. 1949), *cert. denied*, 388 U.S. 851 (1949)).

III. Fifth Amendment Privilege and the Debtor's Books and Records

Despite the mandate of Section 541(4),[3] a debtor may, in certain circumstances, invoke the Fifth Amendment privilege to avoid production of books and records relating to property of the estate. When a debtor is in possession of the books and records sought by the trustee, controlling jurisprudence dictates that the debtor may invoke the Fifth Amendment privilege, where appropriate, due to implied admissions that turnover could affect. *See Fisher*, 425 U.S. at 410-11. Such implied admissions are: (i) that the papers demanded do exist; (ii) that they are in his possession and control; and, (iii) that he believes they are the papers demanded or otherwise would impliedly authenticate them through production. As explained by the Supreme Court in *Fisher*:

The act of producing evidence in response to a subpoena

> nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced. Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer's belief that the papers are those described in the subpoena. The elements of compulsion are clearly present….

Id. at 410-11. *See also United States v. Doe*, 465 U.S. 605 (1984) (applying "implied admissions" analysis and holding that the act of producing voluntarily prepared papers involved testimonial self-incrimination and, absent a grant of immunity, was privileged); *United States v. Porter*, 711 F.2d 1397, 1403 n. 5 (7th Cir. 1983) (When the existence and location of documents are at issue, their production will arguably be testimonial); *In re Grand Jury Subpoena Duces Tecum*, 722 F.2d 981 (2d Cir. 1983) (allowing former company president to assert privilege as to corporate records in his possession despite the fact that the contents of the records were not privileged); *but see Butcher*, 753 F.2d at 468-69 (noting that the jurisprudence extending to the privilege to protect documents has been largely eroded and is only applied in rare instances); *In re Fairbanks*, 135 B.R. 717, 730 (Bankr. D.N.H. 1991) ("If an asset is unknown to the trustee, and is not reflected in the books and records that he presently possesses, and a disposition of that asset by the debtor was in some way unlawful, the production of the record would logically be communicative and testimonial on the part of the debtor. . . . On the other hand, knowledge of such assets is imperative if the trustee is to fulfill his statutory duties under the Bankruptcy Code to liquidate all assets and distribute the proceeds to the creditors.").

In attempting to solve the issues presented by the *Fisher* jurisprudence as it relates to what is testimonial in a bankruptcy proceeding, a New Hampshire bankruptcy court proposed: "the resolution of the conundrum mentioned above is to simply recognize that there are some regulatory disclosure requirements in modern society that have to be complied with even though there may in fact be some incidental incriminating effects upon the party required to comply provided that the regulatory requirements in question are strictly noncriminal in nature and have general applicability throughout the society." *Fairbanks*, 135 B.R. at 730; *c.f., Butcher*, 753 F.2d at 469 (records relating to property of the bankruptcy estate are generally not protected by the privilege).

Unlike the implied admissions doctrine, some exceptions are well settled. For instance, documents not prepared by the debtor do not constitute compelled disclosure. For example, in the seminal case applying the "implied admissions" doctrine, the Supreme Court refused to extend to the privilege for taxpayers under investigation by the IRS where documents relating to tax returns, which were prepared by the accountants of the taxpayers, were sent from the taxpayers to their attorneys.[4] *Fisher*, 425 U.S. at 393; 396.

Nor can a debtor claim the Fifth Amendment privilege over records not in his or her possession. *Connelly*, 59 B.R. at 437 (citing *Couch,* 409 U.S. at 322; *Fisher*, 425 U.S. at 402.)

In addition, certain "required records" are excluded from the privilege. *See Shapiro v. United States*, 335 U.S. 1, 33 (1948). "This exception is a narrow one limited to 'records required by law to be kept,' and only compels turnover of documents the government requires to be preserved 'pursuant to an essentially regulatory scheme. [Such] records have assumed 'public aspects' which render them analogous to public documents.'" *Connelly*, 59 B.R. at 440-41 (citations omitted).

Similarly, the records of any collective entity, corporations, partnerships and the like, …are not privileged and must be produced, even if they incriminate [the debtor] personally. *Id.* (citing *Bellis v. United States*, 417 U.S. 85, 89-90 (1974)); *Butcher*, 38 B.R. at 794-95; *United States v. MacKey*, 647 F.2d 898 (9th Cir. 1981)).

IV. Adverse Inferences

In some instances, the court may draw an adverse inference when a litigant asserts the Fifth Amendment privilege. *See, e.g., Doe v. Glanzer*, 232 F.3d 1258, 1264 (9th Cir. 2000) (citing *SEC v. Colello*, 139 F.3d 674, 677 (9th Cir. 1998)). Independent evidence of the fact for which the inference is urged must exist. *See, e.g., LaSalle Bank Lake View v. Seguban*, 54 F.3d 387, 391 (7th Cir. 1995); *Peiffer v. Lebanon Sch. Dist*., 848 F.2d 44, 46 (3d Cir.1988).

Several bankruptcy courts have expressed doubts as to whether a debtor could ever confirm a plan while claiming the Fifth Amendment privilege due to the debtor's burden of proving good faith under 11 U.S.C. § 1225(a)(3). *See Snider v. Rogers (In re Rogers)*, Nos. 17-21187-PRW, 18-2001-PRW, 2018 Bankr. LEXIS 187, at *9 (Bankr. W.D.N.Y. Jan. 25, 2018) (citing *In re Girdaukas*, 92 B.R. 373, 377 (Bankr. E.D. Wis. 1988); *In re Abbas*, No. 07-71828-SCS, 2007 Bankr. LEXIS 4342, at *22 (Bankr. E.D. Va. Dec. 20, 2007)).

V. Conclusion

The Fifth Amendment poses many complex issues of competing rights, balancing interests and parsing through jurisprudence dating back over a hundred years. However, its availability to debtors in bankruptcy is clear. To defeat a claim for privilege, a trustee or other party in interest must establish that the debtor is not or was not compelled (physical or morally) to produce the information, that the information is not "testimonial," or that the debtor has not established that the information is incriminating and should urge the reviewing court to consider these issues in light of the Code's policy of full disclosure. 🏛

ENDNOTES:

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2 A trustee may also attempt to invoke §707 – dismissal for cause. *See Connelly*, 59 B.R. 421 ("[I]t should be permissible for this court to exercise its discretion and impose the lesser sanction of dismissal under circumstances permitting a denial of discharge.")

3 "The constitutional privilege cannot be legislatively nullified, whether in bankruptcy or any other situation." *Butcher*, 753 F.2d at 467.

4 While not directly relevant to this article, it is noteworthy that the issue turned on whether the Fifth Amendment applied even were the documents in the hands of the taxpayer (and not his attorney). In other words, the attorney-client privilege did not protect the documents because they were obtainable from the taxpayer and therefore attainable from his attorney. *Fisher*, 425 U.S. at 403-405.