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**PLEADING THE FIFTH – PRACTICAL CONSIDERATIONS
ATTENDANT TO INVOCATIONS OF THE FIFTH AMENDMENT
BY ALLEGEDLY DISHONEST EMPLOYEES,
CO-CONSPIRATORS, AND OTHER WITNESSES**

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I. Introduction

Under the Fifth Amendment to the United States Constitution, “[n]o person ... shall be compelled ... to be a witness against himself.”¹ In the context of a fidelity case, the Fifth Amendment is often invoked by the allegedly dishonest employee, who has no desire to provide information that could be used to fuel a criminal case against him. However, it may also be invoked by alleged co-conspirators for whom the policy provides no coverage, or even by mere witnesses who deem it safer to remain silent in view of the criminal charges the allegedly dishonest employee may be facing. Fidelity cases present a unique backdrop for litigation regarding the inferences to be drawn from such invocations. How can the insured establish a financial benefit, collusion, or manifest intent if the witnesses are silent? Can the insured use an invocation of the Fifth Amendment privilege to create an adverse inference against the insurer? This paper provides a general background regarding the availability of the Fifth Amendment privilege in civil cases and provides guidance on preparing for, and dealing with, potential Fifth Amendment invocations in the context of a typical fidelity case.

II. The Fifth Amendment Privilege Against Self-Incrimination

It is well settled that the availability of the Fifth Amendment privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the criminal exposure which it may invite.² In the context of a civil case, the Fifth Amendment privilege against self-incrimination

¹U.S. Const. Amend. V. The Amendment actually states that a person may not be “compelled *in a criminal case* to be a witness against himself,” but this language has been construed to apply to all cases, whether civil or criminal, administrative or judicial, investigatory or adjudicatory, “wherever the answer might tend to subject to criminal liability him who gives it.” *Kastigar v. U.S.*, 406 U.S. 441, 444 (1972); *McCarthy v. Arndstein*, 266 U.S. 34, 44 (1924). Generally, state constitutions contain similar language. See, e.g., La. Const. Art. I, § 16; Tex. Const. Art. I, § 10; Miss. Const. Art. 3, § 26; Ala. Const. Art. I, § 6.

²*Application of Gault*, 387 U.S. 1, 49 (1967).

depends not upon the likelihood, but upon the possibility of prosecution.³ Courts also examine those circumstances where the disclosures would not be directly incriminating, but could provide an indirect link to incriminating evidence.⁴

An assertion of the privilege will stand if the response could subject the invoker to criminal liability. However, if the response is not actually incriminating, or if the invoker cannot actually be prosecuted for the crime, such as because of immunity, double jeopardy or the lapse of any applicable statutes of limitations, the witness may be compelled to answer.

First, a response may be compelled when it would not expose the invoker to criminal liability. In a civil suit, the witness's decision to invoke the Fifth Amendment is not absolute, entitling the trial court to determine if the assertion is based on good faith and whether a response could subject the witness to criminal liability. The privilege may not be asserted when only civil penalties may result.⁵ Before the trial court can compel the witness to answer, it must be "perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that his answers cannot possibly have such tendency to incriminate."⁶ When a witness is able to demonstrate fear of prosecution, which is more than fanciful or merely speculative, the claim is deemed to pass constitutional muster.⁷ However, "the Fifth Amendment shields against compelled self-incrimination, not legitimate inquiry, in the truth-seeking process."⁸ If the questions posed to the witness are irrelevant or nonthreatening to the potential claims, the danger of incrimination should be considered remote or imaginary, and the witness should be required to answer.

³*In re Corrugated Container Antitrust Litigation*, 661 F.2d 1145, 1150 (7th Cir. 1981); *In re Folding Carton Antitrust Litigation*, 609 F.2d 867, 872 (7th Cir. 1979); *cf.*, *U.S. v. Sharp*, 920 F.2d 1167, 1171 (4th Cir. 1990); *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1263 (9th Cir. 2000).

⁴*Glanzer*, 232 F.3d at 1263.

⁵*Hoffman v. U.S.*, 341 U.S. 479, 488 (1951).

⁶*Id.*

⁷*Zicarelli v. New Jersey State Comm'n of Investigation*, 406 U.S. 472, 478 (1972). The threat of incrimination must be substantial and "real," and not merely trifling or imaginary. *See U.S. v. Moreno*, 536 F.2d 1042, 1049 (5th Cir. 1976); *Steinbrecher v. Comm'r of Internal Revenue*, 712 F.2d 195, 198 (5th Cir. 1995).

⁸*Nat'l Life Ins. Co. v. Hartford Accident and Indem. Co.*, 615 F.2d 595, 598 (3d Cir. 1983).

A plaintiff in a civil suit may attack a witness's invocation of the Fifth Amendment by asserting that the witness cannot actually be prosecuted for the crime, such as when prosecution is barred by immunity, double jeopardy, or the statute of limitations. Unfortunately, in practice, even if the invoker has already been prosecuted for a particular offense, he may be able to point to an alternate crime for which his response could incriminate him.⁹ Further, assuming the court is able to identify the potential crimes for which a witness's response may tend to incriminate him, the statutes of limitation applicable in the jurisdiction in which the case is being tried, as well as in any other jurisdictions where the individual may also become subject to potential criminal liability, should be considered.¹⁰ If there is no possibility of prosecution because all applicable statutes of limitation have expired, the witness is not justified in refusing to respond.¹¹ The plaintiff carries the burden of proving that the limitations period has run, and any doubts will be resolved in the invoker's favor.¹²

When a witness invokes the Fifth Amendment privilege, it is often disruptive to the resolution of the case. For example, it may be difficult to learn the true facts or to obtain key evidence if the witnesses refuse to answer counsel's questions. As such, there are remedies to assist the party who is stymied by application of the privilege. For example, many jurisdictions allow the fact finder to learn that an individual has invoked the Fifth Amendment, and upon learning of such invocation,

⁹For example, the courts in *U.S. v. Stephens*, 492 F.2d 1367, 1374 (6th Cir. 1974), and *U.S. v. Seavers*, 472 F.2d 607, 610-11 (6th Cir. 1973), upheld assertions of the Fifth Amendment privilege despite prior federal criminal convictions because of the possibility of prosecution in other jurisdictions.

¹⁰Consider *In re Corrugated Container Antitrust Litigation*, 662 F.2d 875, 884-85 (5th Cir. 1981), a multi-district civil litigation concerning price-fixing, in which the appellate court vacated a contempt order by the trial court to a non-party witness who was being deposed, holding that not only was the testimony sought incriminating within the meaning of the Fifth Amendment, but also that the statute of limitations had not run on a potential conspiracy charge associated with the price-fixing allegations. The court reasoned that although the federal criminal trial had concluded, that did not guarantee, especially in light of the conduct involved in the case, that a criminal action would not be started in some other state or federal jurisdiction if the statute of limitations did not bar it. A similar result was reached in *In re Folding Carton Antitrust Litigation*, 609 F.2d 867, 871 (7th Cir. 1979), in which the Seventh Circuit remanded the district court's order to compel the deponents to testify, concluding that there was a theoretical possibility that the responses could be used in future prosecutions. Although the criminal case against the deponents was over, the court recognized the incriminating character of the responses, the fact that the statute of limitations had not run on other crimes for which the responses might have provided evidence, and the chance that double jeopardy may not necessarily preclude future prosecution of the deponents.

¹¹See *Brown v. Walker*, 161 U.S. 591, 598 (1896); *Hale v. Henkel*, 201 U.S. 43, 67 (1906); *Pillsbury Co. v. Conboy*, 459 U.S. 248, 267 n.1 (1983).

¹²See, e.g., *U.S. v. Goodman*, 289 F.2d 256, 262-63 (4th Cir. 1961); *In re Corrugated Container Antitrust Litigation*, 662 F.2d at 886.

the jury is permitted in civil cases to draw adverse inferences from its use. The Supreme Court has ratified this practice, as follows:

In a civil suit involving only private parties, no party brings to the battle the awesome powers of the government, and therefore to permit an adverse inference to be drawn from exercise of the privilege does not implicate the policy considerations underlying the privilege.¹³

In many jurisdictions, an adverse inference may be asserted, not merely against the witness who invoked the privilege, but also against a separate party. This presents unique problems in the context of a fidelity case when the insured points to a witness's invocation of the privilege to establish coverage.¹⁴

III. Evidence Subject to Fifth Amendment Invocations

The privilege against self-incrimination is generally asserted by a witness who is asked to provide testimony at deposition or in court. In civil cases, the witness is not permitted to assert a blanket invocation of the privilege and refuse to testify.¹⁵ Instead, an assertion of the privilege in a civil case must be raised in response to each specific inquiry.¹⁶ Requiring a party to object with specificity to the information sought from him aids the court in ruling on the validity of his claim of privilege.¹⁷ A party is not entitled to decide for himself whether he is protected by the Fifth Amendment privilege—this question is for the court to decide after conducting “a particularized inquiry, deciding, in connection with each specific area that the questioning party seeks to explore, whether or not the privilege is well-founded.”¹⁸

¹³*Baxter v. Palmigiano*, 425 U.S. 308, 335 (1976).

¹⁴This issue is explored more fully in the fidelity context in Section IV(B), *infra*.

¹⁵*Securities & Exchange Comm'n v. First Fin. Grp. of Texas*, 659 F.2d 660, 668-69 (5th Cir. 1981); *Capital Prod. Corp. v. Hennon*, 457 F.2d 541, 543 (8th Cir. 1972).

¹⁶*See In re Corrugated Container Antitrust Litigation*, 662 F.2d at 882.

¹⁷*See, e.g., First Fin. Grp.*, 659 F.2d at 668-69; *Nat'l Life Ins. Co. v. Hartford Acc. and Indem. Co.*, 615 F.2d 595, 598-99 (3d Cir. 1980); *Roach v. Nat'l Transp. Safety Bd.*, 804 F.2d 1147, 1151 (10th Cir. 1986); *U.S. v. Malnik*, 489 F.2d 682 685 (5th Cir. 1974); *U.S. v. Allshouse*, 622 F.2d 53, 56 (3d Cir. 1980).

¹⁸*First Fin. Grp.*, 659 F.2d at 668. *See also, e.g., U.S. v. Jones*, 703 F.2d 473, 475 (10th Cir. 1983) (if the incriminating nature of the response is not readily apparent to the court, the claimant must specify how he would be injured by any specific question or answer).

While a witness usually pleads the Fifth Amendment to avoid being compelled to provide incriminating testimony, he may attempt to also assert the privilege to prevent disclosure of incriminating documents. As a general rule, the act of producing documentary evidence, no matter how incriminating, does not implicate the privilege against self-incrimination. The Fifth Amendment protects a person from being incriminated by his own compelled testimony, not by the production of incriminating documents, even where the documents were written by the person asserting the privilege.¹⁹ However, if an incriminating document has “a strong personal connection to the witness” and “the witness was compelled to write it,” the witness may invoke the Fifth Amendment to prevent disclosure.²⁰

IV. Dealing with Fifth Amendment Invocations

Invocations of the Fifth Amendment privilege may arise during discovery or at trial. Although these areas overlap somewhat, certain issues arise more often during either the discovery phase of the action or at trial, and for that reason are discussed separately below.

A. Discovery Phase

Discovery in a fidelity case can be particularly problematic. The allegedly dishonest employee is likely facing criminal liability and may not be willing to cooperate in the coverage suit between his employer and the insurer. Documentary evidence may also have been seized by prosecutors, who may not be willing to voluntarily produce it. Further, when the employee is deposed, he often invokes his Fifth Amendment privilege in response to even innocuous questions. Other deponents, including potential co-conspirators and other employees, may also refuse to respond to questioning out of fear that they could also be exposed to criminal charges.

A party who invokes the Fifth Amendment in opposition to discovery bears the burden of establishing that it applies.²¹ The witness will generally be permitted to

¹⁹See *Fisher v. U.S.*, 425 U.S. 391, 399 (1976).

²⁰*Id.*

²¹ABA SECTION OF ANTITRUST LAW, THE RIGHT AGAINST SELF-INCRIMINATION IN CIVIL LITIGATION (2001), at 115 (citing *Camelot Grp., Ltd. v. W.A. Krueger Co.*, 486 F. Supp. 1221, 1224-25 (S.D.N.Y. 1980); *U.S. v. Melchor Moreno*, 536 F.2d 1042, 1049 (5th Cir. 1976); *Estate of Fisher v. Comm’r of Internal Revenue*, 905 F.2d 645, 649 (2d Cir. 1990).

invoke the privilege if the information sought would furnish a “link in the chain of evidence” necessary for the prosecution of a crime.²²

1. Depositions

The Fifth Amendment often rears its head at the deposition stage. It is quite common for even employees uninvolved in the alleged dishonesty (much less any allegedly dishonest employees or co-conspirators) to attempt to avoid answering deposition questions. In such cases, the witness generally must attend the deposition, be sworn in, and respond individually to each of the questions asked. Again, a blanket invocation of the privilege is not allowed—the witness must invoke the Fifth Amendment in connection with each question separately.²³ This procedure permits a reviewing court to determine whether a particular invocation was appropriate.²⁴

Whether or not the witness attends the deposition with an attorney may impact the nature and extent of his responses. If the witness is accompanied by an attorney, he may be able to assist his client in deciding which questions to answer, or in providing “hypothetical” responses that will help guide the discovery process. On the other hand, a witness’s attorney may be combative and encourage his client to refrain from responding to any of the questions. If the witness is not accompanied by an attorney, he may query present counsel regarding his rights in general or about specific questions, but ethically, attorneys for the insurer or other parties should refrain from counseling him.

Close consideration of the witness’s answers is essential, as the witness who provides some information or documents could be deemed to have waived the privilege, in which case he will be precluded from asserting it in later proceedings.²⁵ Further, when a party has asserted the Fifth Amendment privilege to avoid deposition questions, or responding to other discovery, he may be prohibited from

²²*Id.*

²³See *Doe v. Glanzer*, 232 F.3d 1258, 1263 (9th Cir. 2000); *Capitol Prods. Corp. v. Hennon*, 457 F.2d 541, 543 (8th Cir. 1972).

²⁴*Id.*

²⁵See *Rogers v. U.S.*, 340 U.S. 367, 373 (1951).

later withdrawing that assertion, such as by presenting affidavits or testifying at trial.²⁶

2. Written Discovery

A witness may also refuse to respond to written discovery. As mentioned above, documentary evidence is almost never subject to the Fifth Amendment privilege—only if the witness was compelled to write an incriminating document that has “a strong personal connection to the witness” is it protected from disclosure.²⁷ Interrogatory responses, however, may very well meet these criteria.²⁸ In such cases, again, the privilege must be invoked with specificity.²⁹

Whether the privilege may be invoked in connection with requests for admission has been the subject of considerable litigation. Under Rule 36(b), an admission may not be used against the party in connection with any other proceeding. As such, in some, generally older cases, courts have refused to allow witnesses to assert the privilege in response to requests for admission.³⁰ However,

²⁶See *In re Edmond*, 934 F.2d1304, 1308 (4th Cir. 1991) (precluding defendant from submitting affidavit in support of motion for summary judgment where he had previously invoked the Fifth Amendment to avoid deposition); *SEC v. Hirshberg*, 97-6171, 1999 WL 163992, 173 F.3d 846 (2d Cir. 1999) (striking affidavits in opposition to motion for summary judgment where defendants had previously invoked Fifth Amendment privilege during discovery); see also *U.S. v. Parcels of Land*, 903 F.2d 36, 43 (1st Cir. 1990).

²⁷*Fisher v. U.S.*, 425 U.S. 391, 399 (1976). However, some courts have held that the act of producing records may itself be incriminatory so as to give rise to Fifth Amendment protection. See ABA SECTION OF ANTITRUST LAW, THE RIGHT AGAINST SELF-INCRIMINATION IN CIVIL LITIGATION (2001), at 119 (citing *U.S. v. Hubbell*, 530 U.S. 27, (2000); *Fisher v. U.S.*, 425 U.S. 391, 410 (1976); *U.S. v. Doe*, 465 U.S. 605 (1984)).

²⁸See *Campbell v. Gerrans*, 592 F.2d 1054, 1057 (9th Cir. 1979); *Gordon v. FDIC*, 427 F.2d 578, 580 (D.C. Cir. 1970); *Garcia-Andrate v. Madra's Café Corp.*, 04-71024, 2005 WL 2430195, *1 (E.D. Mich. Aug 03, 2005).

²⁹*Davis v. Fendler*, 650 F.2d 1154, 1160-61 (9th Cir. 1981); *Guy v. Abdulla*, 58 F.R.D. 1, 2 (N.D. Ohio 1973).

³⁰ABA SECTION OF ANTITRUST LAW, THE RIGHT AGAINST SELF-INCRIMINATION IN CIVIL LITIGATION (2001), at 124 (citing *Woods v. Robb*, 171 F.2d 539, 541 (5th Cir. 1948); *U.S. v. La Fontaine*, 12 F.R.D. 518, 520 (D.R.I. 1952); *U.S. v. Lewis*, 10 F.R.D. 56, 57 (D.N.J. 1950); *In re Speer*, 965 S.W.2d 41, 46 (Tex. Ct. Ap. 1998)).

the modern, and majority, view is that the privilege may be asserted because an admission could “furnish a link” in the chain to other evidence.³¹

3. Court Ordered Response

If the witness fails to respond to discovery, whether by refusing to answer deposition questions or to provide a response to written discovery requests, the party seeking the discovery may move to compel the witness’s response. In such cases, the witness may be faced with the “cruel trilemma of self-accusation, perjury or contempt.”³² In some cases, when a witness has been compelled to respond, courts have held that his statements were not given voluntarily and thus could not be used against him.³³ However, the Supreme Court’s decision in *Maness v. Meyers* suggests that the proper course of action may be to risk a contempt order and appeal the decision.³⁴ In *Maness*, the Court considered the propriety of a contempt citation issued to an attorney who had advised his client to ignore a direct order compelling him to provide testimony and produce certain documents.³⁵ Finding that the witness was protected by the Fifth Amendment, the Court held that his attorney had not committed contempt when he advised him to resist the court’s order.³⁶ The Court further noted that, although generally a witness who fails to comply with a court order faces the possibility of criminal contempt, “[w]hen a court during trial orders a witness to reveal information, ... a different situation may be presented.”³⁷ In such cases, compliance with the court’s order could cause the witness to suffer irreparable injury “because appellate courts cannot always ‘unring the bell’ once the

³¹*Id.* at 124-25 (citing *Kramer v. Levitt*, 558 A.2d 760, 765 (Md. Ct. Spec. App. 1989); *LeBlanc v. Spector*, 378 F. Supp. 310 (D. Conn. 1974); *Gordon v. FDIC*, 427 F.2d 578 (D.C. Cir. 1970); *FDIC v. Logsdon*, 18 F.R.D. 57, 58-59 (W.D. Ky. 1955)).

³²ABA SECTION OF ANTITRUST LAW, THE RIGHT AGAINST SELF-INCRIMINATION IN CIVIL LITIGATION (2001), at 70 (quoting *Murphy v. Waterfront Comm’n of New York Harbor*, 378 U.S. 52, 55 (1964)).

³³*Id.* (citing *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967); *Spevack v. Klein*, 385 U.S. 511 (1967); *Uniformed Sanitation Men Ass’n v. Comm’r of Sanitation*, 392 U.S. 280 (1968); *Lefkowitz v. Turley*, 414 U.S. 70 (1973)). *But see id.* at 71, n. 57 (citing *Baxter v. Palmigiano*, 425 U.S. 308 (1976) (distinguishing *Garrity* and its progeny)). The court in *In re Grand Jury Proceedings (Williams)*, 995 F.2d 1013, 1014, reached the opposite conclusion, holding that it is constitutional to use compelled testimony against the witness because otherwise, the court’s order would provide the witness with use immunity, a power that is reserved to the executive branch. *Id.* at 72, n. 58.

³⁴*Id.* at 72 (citing *Maness v. Meyers*, 419 U.S. 449 (1975)).

³⁵*Maness*, 419 U.S. at 453-55.

³⁶*Id.* at 468.

³⁷*Id.* at 460.

information has been released.”³⁸ The Court noted that individuals in such situations have a choice, to either comply with the order prior to review and face the consequences (e.g., potential waiver and release of incriminating information or documents) or appeal the order and face the possibility of being held in contempt if the court’s ruling is upheld.³⁹

4. Criminal Investigations

A preliminary step in obtaining discovery in a fidelity case is determining whether a criminal investigation has been instituted. If so, it is likely that the prosecutors are in possession of both pertinent documentary evidence and relevant information. Indeed, if witnesses have invoked the Fifth Amendment privilege, obtaining information from the prosecution may be the only means of obtaining pertinent information. Unfortunately, it is often extremely difficult to obtain information about an ongoing investigation unless counsel has a contact who is willing to provide the information informally. A survey of pertinent state rules and regulations is beyond the scope of this paper, but many states have adopted rules similar to the federal rules, and in any case criminal investigations regarding allegedly dishonest employees are often instituted by the federal government. For that reason, this paper will focus on the rules and regulations pertinent to obtaining information and documents from the United States Department of Justice (“DOJ”).

The DOJ has promulgated extensive regulations governing both the procedural and substantive requirements that must be met when a demand for information is made upon an employee of the DOJ in connection with a case in which the United States is not a party.⁴⁰ These regulations are, in general, rigidly enforced and create something akin to an assertion of a special governmental privilege every time the government decides not to disclose information. In *Touhy v. Ragen*, the United States Supreme Court held that a subordinate official in the DOJ may refuse to obey a subpoena duces tecum ordering production of department papers in his possession where such refusal was based on a valid regulation that prohibited the subordinate official from responding to a demand for disclosure and instead required the Attorney General to decide whether and how to

³⁸*Id.*

³⁹*Id.*

⁴⁰The DOJ’s authority to promulgate such regulations is based on the Federal Housekeeping Statute, 5 U.S.C.A. § 301 (formerly 5 U.S.C. § 22). See *Touhy v. Ragen*, 340 U.S. 462, 467 (1951); see also *NLRB v. Capitol Fish Co.*, 294 F.2d 868, 874 (5th Cir. 1961). The regulations are often referred to as “*Touhy* Regulations.”

respond.⁴¹ Thus, a governmental official may lawfully refuse to comply with a subpoena without subjecting himself to the usual sanctions for his failure to comply.

Under the current regulations, employees and former employees of the DOJ are prohibited from “produc[ing] any material contained in the files of the Department, or disclos[ing] any information relating to or based upon material contained in the files of the Department, or disclos[ing] any information or produc[ing] any material acquired as part of the performance of that person’s official duties or because of that person’s official status without prior approval of the proper Department official.”⁴² Further, an employee or former employee upon whom a demand for information has been made must “immediately notify” the U.S. Attorney for the district.⁴³ When a demand is referred to a U.S. Attorney or his designee (whom the regulations term the “responsible official”), that person is tasked with immediately advising the official in charge of the bureau, division or agency of the DOJ that was responsible for the preparation of the material demanded (termed the “originating component”).⁴⁴ The responsible official is under certain circumstances empowered to authorize the testimony of a present or former DOJ employee or the production of DOJ files if the originating component does not object and if the disclosure demanded is appropriate.⁴⁵ Generally, although the information that might be sought in

⁴¹*Touhy*, 340 U.S. at 467.

⁴²28 C.F.R. § 16.22(a).

⁴³28 C.F.R. § 16.22(b). The procedural regulations distinguish between demands for oral testimony and demands for records. See 28 C.F.R. § 16.22. If a demand seeks oral testimony, the requesting party must submit to the responsible U.S. Attorney an affidavit or, if an affidavit is not feasible, a statement providing a “summary of the testimony sought and its relevance to the proceeding.” 28 C.F.R. § 16.22(c). If the employee is subsequently authorized to give oral testimony, such testimony is then limited, by regulation, to the scope of the demand as summarized in the statement or affidavit. *Id.* Similarly, when information other than oral testimony is sought, the U.S. Attorney for the district must “request a summary of the information sought and its relevance to the proceeding.” 28 C.F.R. § 16.22(d).

⁴⁴28 C.F.R. § 16.24(a).

⁴⁵28 C.F.R. § 16.24(b). Disclosure may be refused if it would: (1) “violate a statute... or a rule of procedure, such as the grand jury secrecy rule”; (2) “violate a specific regulation”; (3) “reveal classified information, unless appropriately declassified...”; (4) “reveal a confidential source or informant...”; (5) “reveal investigatory records compiled for law enforcement purposes, and would interfere with enforcement proceedings or disclose investigative techniques and procedures the effectiveness of which would thereby be impaired”; or (6) “improperly reveal trade secrets without the owner’s consent.” 28 C.F.R. § 16.26(b). If any of factors (1)-(3) are present, disclosure is strictly prohibited. 28 C.F.R. § 16.26(c). However, if factors (4)-(6) are present, disclosure is merely disfavored unless the Deputy or Associate Attorney General determines that “the administration of justice requires disclosure.” *Id.* Where disclosure is “necessary to pursue a civil or criminal prosecution or affirmative relief,” the agency decisionmakers are directed to consider: “(1) The seriousness of the violation or crime involved; (2) The past history or criminal record of the violator or accused; (3) The importance of the relief sought; (4) The

connection with a fidelity claim would likely be considered “investigatory records compiled for law enforcement purposes” or “investigative techniques” for which disclosure is disfavored, disclosure may be permissible if the “administration of justice requires disclosure.”⁴⁶ However, when information is “collected, assembled or prepared in connection with litigation or an investigation,” the Assistant Attorney General in charge of the division that collected the information may require that the originating component obtain the division’s approval before authorizing a responsible official to disclose such information.⁴⁷

In the event that the responsible U.S. Attorney and the “originating component” disagree as to whether to disclose or to allow testimony, or if they agree that disclosure is inappropriate, they must determine if the demand involves information that was “collected, assembled, or prepared in connection with litigation or an investigation,” in which case the U.S. Attorney must notify the Assistant Attorney General in charge of the division responsible for the litigation or investigation.⁴⁸ The Assistant Attorney General then may: (1) authorize the “demanded testimony or other disclosure of the information” (assuming that disclosure is not disallowed⁴⁹); (2) authorize the responsible official to negotiate or to move the court to limit the demand so as not to offend the disfavored substantive factors, or to “otherwise take all appropriate steps to limit the scope or obtain the withdrawal of a demand”; or (3) refer the matter for final resolution to the Deputy or Associate Attorney General, who will make the final decision as to the discoverability of the demanded information.⁵⁰

importance of the legal issues presented; [and] (5) Other matters brought to the attention of the Deputy or Associate Attorney General.” 28 C.F.R. § 16.26(c). If the requested information or document production falls outside the permissible scope of the regulations, the responsible official must attempt to limit the demand to the disclosure of information consistent with these substantive considerations. 28 C.F.R. 16.24(c). However, if the regulations do not implicate any of the above factors, the Deputy or Assistant Attorney General should authorize disclosure unless he finds that disclosure is not “appropriate under the rules of procedure governing the case or matter in which the demand arose” or “appropriate under the relevant substantive law concerning privilege.” 28 C.F.R. § 16.26(a), (c).

⁴⁶28 C.F.R. § 16.26(c).

⁴⁷28 C.F.R. 16.24(c).

⁴⁸28 C.F.R. 16.24(d)(1).

⁴⁹The Assistant Attorney General must determine if the disclosure is consistent with the applicable substantive considerations specified in § 16.26(a) and that none of the factors specified in § 16.26(b) exist. 28 C.F.R. 16.24(d)(1).

⁵⁰28 C.F.R. 16.24(d)(1)(i)-(iii).

Basically, the DOJ regulations withdraw from subordinate agency officials the decision as to whether or how to comply with a demand for information and vest that decisionmaking power solely with authorized officials, who will determine whether and how to produce the documents.⁵¹ If this higher official denies disclosure, the subpoenaed DOJ employee will not only be unresponsive, but may be immune from court ordered sanctions, such as a contempt order.⁵²

If a request for information or documents is denied, there are several potential courses of action. First, it may be possible to challenge the assertion of privilege in the ongoing civil action, although it may be difficult to determine who should be brought into court to justify the assertion of privilege. Another option is to institute collateral litigation, such as an Administrative Procedure Act, 5 U.S.C.A. § 551 (“APA”), suit or a mandamus action, or to request the information pursuant to the Freedom of Information Act, 5 U.S.C. § 552 (“FOIA”).

Under the APA, the agency’s decision to deny disclosure may be challenged on the grounds that the decision was “arbitrary and capricious, or otherwise not in accordance with law.”⁵³ For agency action to be reviewable under the APA, the agency must issue a final decision on the request for information filed under the *Touhy* Regulations.⁵⁴ A mandamus action may also be filed to compel the U.S. Attorney, or other responsible official, to perform his ministerial duties as required by law.

No court appears to have held that the pertinent DOJ regulations, *i.e.*, 28 C.F.R. § 16.22, *et seq.*, establish an absolute privilege under which agency officials may never be required to testify.⁵⁵ To hold thus may violate the constitutional separation of powers by “vesting an executive branch official with the heretofore

⁵¹Failure on the part of the litigant seeking information to comply with the procedural regulations prior to pursuing a court remedy is likely to result in a quashing of the subpoena—without the court ever reaching the substantive merits of the agency’s assertion of privilege. *F.A.C., Inc., v. Cooperative De Seguros De Vida*, 188 F.R.D. 181, 184 (D.P.R. 1999) (citing *Davis v. Braswell Motor Freight Lines, Inc.*, 363 F.2d 600, 603 (5th Cir. 1966)).

⁵²See *In re Boeh*, 25 F.3d 761, 765 (9th Cir. 1994); *Landry v. FBI*, 1997 WL 375881 (E.D. La. July 3, 1997). In other words, the correctness of the U.S. Attorney’s decision to withhold disclosure may not be reviewable in an action to hold an Assistant U.S. Attorney, or other subordinate, in contempt for failure to comply with a subpoena—not even through an *in camera* inspection of the requested information by the court. *In re Boeh*, 25 F.3d at 765, 767.

⁵³*Meisel v. FBI*, 204 F. Supp. 2d 684, 690 (S.D.N.Y. 2002).

⁵⁴*Id.*

⁵⁵See *In re Boeh*, 25 F.3d 761, 764 (9th Cir. 1994).

exclusively judicial power to determine what evidence will be admitted into trial.”⁵⁶ Indeed, courts are loathe to abdicate their traditional function as evidentiary gatekeepers to the executive branch.⁵⁷ As such, a substantive challenge to the agency’s decision, raised in the context of the civil insurance coverage proceeding, may be possible.

There are several advantages to this course of action. First, raising the issue in the context of an ongoing proceeding reduces the often time consuming and expensive collateral litigation involved with mandamus actions and APA suits. In addition, a substantive challenge relieves the document seeker of the heavier burden of proving that the agency’s decision was “arbitrary and capricious” as is required in an APA suit. Further, it may relieve the party seeking the documents from the burden of waiting for a final agency decision or agency action, a prerequisite for an APA suit. In the Fifth Circuit, inaction by the relevant agency, meaning a refusal to respond to a validly filed request for evidence or testimony, is treated as an assertion of the privilege in cases where the request could only be properly denied if the evidence or testimony were privileged.⁵⁸

On the whole, however, such challenges to agency decisions are difficult. If the agency grounds its denial of disclosure in a claim that it would “reveal investigatory records compiled for law enforcement purposes” and “interfere with enforcement proceedings,” some courts appear to place the burden on the party requesting disclosure to show that the administration of justice requires disclosure.⁵⁹ Further, because the relevant decision making processes take place behind the agency’s closed doors, it is difficult for the outside litigant to determine which agency official actually made the decision and thus should be brought into court to justify it.

As such, some courts see a collateral APA suit as the proper recourse when disclosure is denied.⁶⁰ These courts reason that such an action is preferable

⁵⁶*Id.*

⁵⁷*U.S. v. Reynolds*, 345 U.S. 1, 9-10, (1953) (“[J]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.”); *Carter v. Miss. Dep’t of Corrections*, 1996 WL 407241, *3 (N.D. Miss. 1996) (“Without a specific grant of power by Congress to do so, executive agencies lack the authority to issue dictates to the court regarding the admissibility of evidence.”).

⁵⁸*NLRB v. Capitol Fish Co.*, 294 F.2d 868, 874 (5th Cir. 1961) (holding that the question of privilege is “as squarely raised by an unexplained refusal to comply as by an express claim of privilege, and the court must decide the question”).

⁵⁹*See Meisel v. FBI*, 204 F. Supp. 2d 684 (S.D.N.Y. 2002).

⁶⁰*Miskiel v. Equitable Life Assur. Soc’y*, 1999 WL 95998, *2 (E.D. Pa. Feb. 24, 1999).

because the subpoenaed agency official is generally not the responsible agency official who decided not to comply with the subpoena.⁶¹ Additionally, a subpoenaed official, once disclosure is denied by a higher authority, generally lacks the authority to produce the documents.⁶²

A final option is attempt to discover the information pursuant to FOIA on the grounds that it is a matter of public interest.⁶³ Although FOIA creates a presumption in favor of disclosure, the governmental entity will not be required to release the information if one of the statutory exemptions to disclosure applies.⁶⁴ One such exemption is Section (b)(7) of the Act, which carves out “records or information compiled for law enforcement purposes” from required disclosure, but does so “only to the extent that the production of such law enforcement records or information” falls within six more specific exemptions.⁶⁵ Thus, to claim that the information requested is exempt under Section (b)(7), the withholding agency must satisfy a two pronged test.⁶⁶ First, the agency must show that the requested document was “compiled for law enforcement purposes.”⁶⁷ In addition, the government must demonstrate that release of the material in question would meet the requirements

⁶¹*Id.*

⁶²*Id.*

⁶³Because FOIA claims are grounded in the public’s right to know certain information, it should not matter that the fidelity insurer may be an interested party in a related civil suit. See *Kay v. FCC*, 976 F. Supp. 23, 38-39 (D.D.C. 1997) (holding that a requesting party’s rights in the withheld documents are “neither diminished nor enhanced by any litigation-generated need for the documents”) (citing *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)); see also *Solar Sources, Inc. v. U.S.*, 142 F.3d 1033, 1041 (7th Cir. 1998).

⁶⁴*FBI v. Abramson*, 456 U.S. 615, 621 (1982); *Manna v. U.S. Dep’t of Justice*, 51 F.3d 1158, 1163 (3d Cir. 1995).

⁶⁵U.S.C. §552(b)(7). Exemption 7 may be invoked for information not initially compiled for law enforcement purposes if the information subsequently becomes part of a legitimate law enforcement file. *Fedders Corp. v. FTC*, 494 F. Supp. 325, 328 (S.D.N.Y.), *aff’d mem.*, 646 F.2d 560 (2d Cir. 1980); see also *Lesar v. United States Dep’t of Justice*, 636 F.2d 472, 487 (D.C. Cir. 1980).

⁶⁶*Abramson*, 456 U.S. at 622.

⁶⁷*Id.* The exemption has been extended to include instances where a showing can be made that there exists “a concrete prospective law enforcement proceeding for which the records were compiled.” *Scheer v. U.S. Dep’t of Justice*, 35 F. Supp. 2d 9, 12 (D.D.C. 1999) (quoting *Nat’l Pub. Radio v. Bell*, 431 F. Supp. 509, 514 (D.D.C. 1977)). Courts have taken differing approaches in determining whether a particular document satisfies this first prong. Alfred Aman & William Mayton, *Administrative Law* §17.4.7 (2d ed. 2001). For example, the First, Second, Sixth and Eighth Circuits apply a per se rule and find that all criminal enforcement agency investigative records meet this first prong. *Id.* Other courts, including the D.C. Circuit Court of Appeals, require the withholding agency to show a specific nexus between the records and a valid law enforcement purpose. *Id.*

of at least one of the more specific exemptions within Section (b)(7).⁶⁸ In the fidelity context, generally Section (b)(7)(A) or, to a lesser extent, Section (b)(7)(E), may apply. Section (b)(7)(A) exempts from disclosure information which “could reasonably be expected to interfere with enforcement proceedings.”⁶⁹ Exemption (b)(7)(E) excludes records or information that “would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.”⁷⁰

Section (b)(7)(A) requires the withholding agency to make a threshold showing that disclosure of the requested information would “interfere with enforcement proceedings.”⁷¹ Thus, an agency invoking this exemption must first show that a law enforcement proceeding is either pending or prospective.⁷² Next, the withholding agency must show that releasing this information “could be reasonably expected to cause some specific harm” to the pending proceeding.⁷³ An agency may not withhold documents simply because they are related to an enforcement

⁶⁸*Abramson*, 456 U.S. at 622.

⁶⁹5 U.S.C. §552(b)(7)(A).

⁷⁰5 U.S.C. §552(b)(7)(E).

⁷¹5 U.S.C. § 552(b)(7)(A); *see also Abramson*, 456 U.S. at 622; *Scheer v. U.S. Dep’t of Justice*, 35 F. Supp. 2d 9, 12 (D.D.C. 1999). Generally, when courts evaluate an agency’s decision to withhold disclosure of information, they do so as of the time the agency’s decision was made and do not consider subsequent developments. However, in *Scheer v. U.S. Dep’t of Justice*, 35 F. Supp. 2d 9, 12-14 (D.D.C. 1999), the court held that in determining whether the agency has established interference, the court may consider whether the information has been subsequently disclosed. In addition, while exemption 7(A) was not designed to protect the records of closed investigations, *see* 120 Cong. Rec. S9329 (daily ed. May 30, 1974) (remarks of Senator Hart), such records may nevertheless be exempt from disclosure under the exemption. *See Nat’l Pub. Radio v. Bell*, 431 F. Supp. 509, 514-15 (D.D.C. 1977) (holding that although the investigation was in a “dormant stage in that all available investigative leads ha[d] been pursued” without success, records were protected because the investigation was “one which will hopefully lead to a ‘prospective law enforcement proceeding’” within the meaning of the exemption); *New England Med. Ctr. Hosp. v. NLRB*, 548 F.2d 377, 385 (1st Cir. 1976) (exemption may apply “where the closed file documents remain fully relevant to a specific pending enforcement proceeding, although, to be sure, not the one for which they are precisely intended”); *Stern v. FBI*, 737 F.2d 84, 88 (D.C. Cir. 1984) (government may claim the threshold shelter of the exemption without the necessity of showing “that the investigation led to, or will lead to, adjudicative or enforcement proceedings”).

⁷²*Aman*, *Administrative Law* §17.4.7(1).

⁷³*Id.*

proceeding.⁷⁴ Instead, the agency may invoke Section (b)(7)(A) only when an investigation or proceeding may be harmed.⁷⁵

Generally, harm sufficient to implicate Section (b)(7)(A) falls under two categories. First, the withholding agency may invoke the exemption to prevent the release of information it believes would lead to witness tampering or intimidation, witness endangerment, or “would create a chilling effect on potential sources and dry up sources of information.”⁷⁶ The withholding agency need not allege that such harm has happened or is “certain to occur,” but merely that it is a possibility.⁷⁷ Second, agencies may assert a general harm or interference flowing from the release of the records that would reveal the scope, direction and nature of its investigation or give the plaintiff or other individuals insight into the investigation against them.⁷⁸ This “generic harm” includes the harm of granting a party litigant “earlier and greater access to the [agency’s] case than he would otherwise have” thus affording that litigant the opportunity to construct defenses that might defeat the pending charges.⁷⁹ Courts are also concerned that disclosure may publicly leak an ongoing investigation to potential suspects who have not yet been charged, thus interfering with the agency’s ability to compile evidence against such persons.⁸⁰

⁷⁴See *Kay*, 976 F. Supp. at 38-39.

⁷⁵*Id.* Some courts have held that, to show interference or harm, the agency must be “specific as to what information is being withheld and the distinct harm that could result from its disclosure” and may not be “conclusory or vague.” *Scheer*, 35 F. Supp. 2d at 12 (quoting *Kuffel v. U.S. Bureau of Prisons*, 882 F. Supp. 1116, 1126 (D.D.C. 1995)); *Kay*, 976 F. Supp. at 38. Others, however, place a light burden on the government, which is not required to justify its refusal to disclose on a document-by-document basis, but may do so by referring to general categories of documents. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236 (1978) (holding that federal courts may make “generic determinations that, with respect to certain kinds of enforcement proceedings, disclosure of particular kinds of investigatory records while a case is pending would generally ‘interfere with enforcement proceedings’”); see also *Solar Sources, Inc. v. U.S.*, 142 F.3d 1033, 1037 (7th Cir. 1998).

⁷⁶*Manna v. U.S. Dep’t of Justice*, 51 F.3d 1158, 1163 (3d Cir. 1995) (quoting *Grasso v. IRS*, 785 F.2d 70, 76-77 (3d Cir. 1986)); accord *Church of Scientology v. IRS*, 816 F. Supp. 1138, 1156-57 (W.D. Tex. 1993).

⁷⁷*Kay*, 976 F. Supp. at 39; *Solar Sources*, 142 F.3d at 1039. Many cases that rest on this “witness chilling” rationale are Mafia-related, which may somewhat explain the low burden of proof placed on the government. See *Manna*, 51 F.3d at 1158; *Martorano v. FBI*, 89-377, 1991 WL 212521 (D.D.C. Sept. 30, 1991).

⁷⁸*Kay v. FCC*, 976 F. Supp. 23, 38-39 (D.D.C. 1997).

⁷⁹*Kay*, 976 F. Supp. at 39 (citing *Robbins Tire & Rubber*, 437 U.S. at 241); accord *Church of Scientology v. IRS*, 816 F. Supp. 1138, 1156-57 (W.D. Tex. 1993).

⁸⁰*Solar Sources*, 142 F.3d at 1039.

The government may also argue that some information is exempt under FOIA Section (b)(7)(E).⁸¹ The agency seeking to rely on this exemption must, as with Section (b)(7)(A), first establish a law enforcement purpose. In addition, the agency must show that disclosure of the requested information or documents “would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law.”⁸² This exemption prevents disclosure of techniques and procedures that are: (1) not generally known to the public, (2) generally publicly known but “the circumstances of their usefulness are not,” or (3) are known to the public to some extent, but public disclosure could “erode their effectiveness.”⁸³ Again, the withholding agency bears the burden of showing that the exemption applies and “[s]elf-serving, conclusory statements” will not satisfy this burden.⁸⁴ However the withholding agency may meet its burden through a description of the “general nature of the technique while withholding the full details.”⁸⁵ It is not necessary, under Section (b)(7)(E), for the withholding agency to show that the withheld documents relate to any particular investigation, only that they were compiled for a law enforcement purpose.⁸⁶

⁸¹5 U.S.C. §552(b)(7)(E).

⁸²*Id.*

⁸³*Peter S. Herrick's Customs v. U.S. Customs & Border Protection*, 04-00377, 2006 WL 1826185, at *7 (D.D.C. June 30, 2006); *Church of Scientology v. IRS*, 816 F. Supp. 1138, 1162 (W.D. Tex. 1993) (quoting *Hale v. U.S. Dep't of Justice*, 973 F.2d 894, 902-03 (10th Cir. 1992)); *Rosenfeld v. U.S. Dep't of Justice*, 57 F.3d 803, 815 (9th Cir. 1995); *Albuquerque Publ'g Co. v. U.S. Dep't of Justice*, 726 F. Supp. 851, 857-58 (D.D.C. 1989). What information is publicly known is a matter of some debate. See *Tax Analysts*, 294 F.3d at 79 (quoting Senate Conf. Report at 6291) (exemption 7(E) was not intended to cover “routine techniques and procedures ... such as ballistic tests, fingerprinting, and other scientific tests commonly known”); *Rosenfeld*, 57 F.3d at 815 (use of pretextual phone calls is an investigative technique generally known to the public); *Albuquerque Publ'g Co.*, 726 F. Supp. at 857-58 (“use of wired informants and ‘bugs’ secretly placed in rooms that are under surveillance,” and “eavesdropping, wiretapping, and surreptitious tape recording and photographing” are known to the public); *Blanton v. Dep't of Justice*, 64 Fed. Appx. 787, 789 (D.C. Cir. 2003) (polygraph information was not generally known to the public); *Peter S. Herrick's Customs*, 2006 WL 186185, at *7 (documents that revealed the “process by which seized materials are returned to their rightful owners” and information that disclosed the “procedures and techniques relating to seizure and deactivation of monetary instruments” were properly withheld).

⁸⁴*Ferri v. Bell*, 645 F.2d 1213, 1223-24 (3d Cir. 1981).

⁸⁵*Judicial Watch, Inc. v. U.S. Dep't of Commerce*, 337 F. Supp. 2d 146, 181 (D.D.C. 2004).

⁸⁶*Tax Analysts v. IRS*, 294 F.3d 71, 79 (D.C. Cir. 2002).

In the fidelity context, the amount of information and documentation, if any, that may need to be obtained from the prosecution will obviously vary depending on the facts of each case. The ease of obtaining that information will also vary. Obviously, it would be ideal to have an inside contact who is willing to informally provide information regarding the investigation or prosecution and, if necessary, smooth the way for a formal request for information and documents. Some information or documents could also be obtained from the witnesses or their counsel. In the context of a coverage suit, the insurer may effectively be aligned with the allegedly dishonest employee (*e.g.*, both would like to establish that the employee did not engage in dishonest conduct), and his counsel may be willing to voluntarily provide information and documentation to the insurer, regardless of whether the employee is a party to the civil suit. In short, although discovery in a fidelity case is likely to present some difficulties, there are potential avenues for obtaining requisite information and evidence.

B. Trial Concerns

In the context of a criminal case, the Fifth Amendment does not allow a fact finder to draw negative inferences from a party's assertion of the privilege against self-incrimination. However, "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them: 'The Amendment does not preclude the inference where the privilege is claimed by a party to civil litigation.'"⁸⁷ Thus, in a civil case, the finder of fact may draw adverse inferences from a person's invocation of the Fifth Amendment privilege.⁸⁸

First, it should be noted that the jury is not necessarily entitled to learn that a witness has invoked the Fifth Amendment. If counsel is aware that a particular witness is likely to do so when called to the stand (such as when he previously did so at deposition), the best course is to inform the court in advance of the potential

⁸⁷*Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). *Cf. U.S. ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153-154 (1923) ("Silence is often evidence of the most persuasive character."); *U.S. v. Hale*, 422 U.S. 171, 176 (1975) ("Failure to contest an assertion ... is considered evidence of acquiescence ... if it would have been natural under the circumstances to object to the assertion in question.").

⁸⁸When a party invokes the privilege in an answer or response to a counterclaim, he must do so with particularity, *i.e.*, in response to specific numbered allegations in the complaint. ABA SECTION OF ANTITRUST LAW, THE RIGHT AGAINST SELF-INCRIMINATION IN CIVIL LITIGATION (2001), at 110 (citing *North River Ins. Co. v. Stefanou*, 831 F.2d 484, 487 (4th Cir. 1987)). In such cases, courts treat the invocation as a specific denial, requiring the plaintiff to prove the allegation for which the invocation was asserted. *Id.* at 109 (citing *Stefanou*, 831 F.2d at 486-87; *Rogers v. Webster*, 776 F.2d 607 (6th Cir. 1985); *Indus. Indem. Co. v. Niebling*, 844 F. Supp. 1374 (D. Ariz. 1994); 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1280 (2d ed. 1990)).

invocation and request that the witness be questioned initially outside of the presence of the jury. If in fact the witness does invoke his Fifth Amendment privilege, counsel can then seek a protective order prohibiting any reference to the invocation in the jury's presence.⁸⁹ The court's willingness to entertain such a request is largely considered on a case-by-case basis pursuant to an evidentiary balancing test, *i.e.*, the probative value of the invocation is weighed against the danger of unfair prejudice.⁹⁰ The court generally has significant discretion in deciding whether to admit such evidence.⁹¹

If the court does allow a witness to invoke the Fifth Amendment before the jury, or if the parties are permitted to reference a witness's invocation of the privilege, the fact finder may, but is not required to, draw an adverse inference from it.⁹² In such cases, the extent and applicability of the inference vary greatly by jurisdiction. Some courts allow an inference to be drawn from the invocation of the Fifth Amendment privilege by even non-party witnesses,⁹³ while others apply an inference only when the invocation is made by one of the parties to the action.⁹⁴ As

⁸⁹Alternatively, if the case is tried before the bench, counsel can seek an order precluding the court from drawing an adverse inference from the witness's invocation, as discussed below.

⁹⁰*See, e.g., Harrell v. DCS Equip. Leasing Corp.*, 951 F.2d 1453, 1464 (5th Cir. 1992) (applying balancing test of Rule 403). Rule 403 of the Federal Rules of Evidence provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

State evidentiary rules generally contain similar language.

⁹¹*See, e.g., SEC v. Colello*, 139 F.3d 674, 677 (9th Cir. 1998) (holding that, if the invocation of the privilege prejudices another party, the court is "free to fashion whatever remedy is required to prevent unfairness"); *FDIC v. Fid. & Deposit Co. of Maryland*, 45 F.3d 969, 977 (5th Cir. 1995).

⁹²*See Daniels v. Pipefitters' Ass'n*, 983 F.2d 800 (7th Cir. 1993); *U.S. v. Stein*, 233 F.3d 6, 16 (1st Cir. 2000).

⁹³*See, e.g., Brink's Inc. v. City of New York*, 717 F.2d 700, 707-10 (2d Cir. 1983); *Rosebud Sioux Tribe v. A&P Steel, Inc.*, 733 F. 2d 509, 522 (8th Cir. 1984).

⁹⁴*See, e.g., Economy Auto Salvage, Inc. v. Allstate Ins. Co.*, 499 So. 2d 963, 977 (La. App. 3 Cir. 1986); *LaSalle Bank Lake View v. Seguban*, 54 F.3d 387, 391 (7th Cir. 1995). *Cf. 5-Star Premium Fin., Inc. v. Wood*, 99-3705, 2000 WL 1532896 (E.D. La. Oct. 16, 2000) (summary judgment cannot be based on reliance on Fifth Amendment invocations without corroborating evidence).

with the court's decision to admit such evidence, the limits of the inference are often considered according to the facts of each case.⁹⁵

Although many jurisdictions permit an adverse inference to be drawn against a party when a non-party witness invokes the Fifth Amendment privilege, often courts require some relationship between the witness and the party against whom the inference is to be drawn. For example, a number of courts have permitted an adverse inference to be drawn against a party when a former or current employee, agent, officer, or director invokes the privilege.⁹⁶ Further, before allowing an adverse inference to be drawn against a party from a non-party witness, courts generally require the party supporting the inference to present corroborating evidence.⁹⁷ In other words, factual findings, such as a finding of financial benefit or collusion, cannot be premised solely on a Fifth Amendment invocation.⁹⁸

While the jurisprudence teems with cases addressing the permissible extent of the inferences to be drawn from a person's invocation of the Fifth Amendment, there are only a few decisions involving fidelity policies. In *Ralph Hegman Co. v. Transamerica Insurance Co.*, the court allowed an inference to be drawn against the fidelity insurer where the principal, a co-defendant, invoked the Fifth Amendment.⁹⁹ The court specifically found a relationship between the insurer and the principal,

⁹⁵See *LiButti v. U.S.*, 107 F.3d 110, 121 (2d Cir. 1997).

⁹⁶See, e.g., *Brink's Inc. v. City of New York*, 717 F.2d 700, 710 (2d Cir. 1983); *RAD Servs., Inc. v. Aetna Cas. & Sur. Co.*, 808 F.2d 271, 275 (3d Cir. 1986); *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 825 F. Supp. 340, 352-53 (D. Mass. 1993). In *Libutti v. U.S.*, 107 F.3d 110, 123-24 (2d Cir. 1997), the court listed four nonexclusive factors to be considered in determining whether an adverse inference may be drawn against a party from a non-party witness's invocation of the Fifth Amendment privilege: (1) the nature of the relevant relationships; (2) the degree of control exercised by the party over the nonparty witness; (3) the compatibility of the interests of the party and the nonparty witness in the outcome of the litigation; and (4) whether the nonparty witness was a key factor or played a controlling role in the litigation. ABA SECTION OF ANTITRUST LAW, *THE RIGHT AGAINST SELF-INCRIMINATION IN CIVIL LITIGATION* (2001), at 107 (citing *Libutti*, 107 F.3d at 123-24, and suggesting a fifth factor, "whether the nonparty witness has independent reasons for invocation that create a significant possibility that the witness is exercising the privilege for reasons that would not logically support an inference against the party.").

⁹⁷See *Baxter v. Palmigiano*, 425 U.S. 308, 317 (1976); *Curtis v. M&S Petroleum, Inc.*, 174 F.3d 661, 675 (5th Cir. 1999); *Avirgan v. Hull*, 932 F.2d 1572, 1580 (11th Cir. 1991); *Kontos v. Kontos*, 968 F. Supp. 400, 408-09 (S.D. Ind. 1997); *FDIC v. Fid. & Deposit Co. of Maryland*, 45 F.3d 969, 978 (5th Cir. 1995); *Koester v. American Republic Invs., Inc.*, 11 F.3d 818, 823-24 (8th Cir. 1993); *CSC Holdings, Inc. v. J.R.C. Prods., Inc.*, 78 F. Supp. 2d 794, 801-02 (N.D. Ill. 1999); *Hughes Tool Co. v. Meier*, 489 F. Supp. 354, 374-75 (D. Utah 1977); *Mount Airy Ins. Co. v. Millstein*, 928 F. Supp. 171, 174 (D. Conn. 1996).

⁹⁸*Id.*

⁹⁹198 N.W. d 555, 558 (Minn. 1972).

concluding that because Transamerica insured the plaintiff against any loss resulting from dishonesty or fraud on the part of employee, it had assumed certain responsibilities for the employee's acts. The court stated that if the jury could have drawn inferences against the employee because of his assertion of the privilege, there was no sound reason "why the jury should not be permitted to draw the same inferences in considering the substantially identical claim of the plaintiff against appellant."¹⁰⁰

In *First National Bank of Louisville v. Lustig*, the insurers sought to exclude any reference to the refusal of two witnesses to answer deposition questions in reliance on their Fifth Amendment privilege because they believed that the insured would seek to introduce this information at trial.¹⁰¹ The insurers argued that the blanket invocation of the Fifth Amendment by one of the witnesses was "at best ambiguous, if not meaningless, regarding the issue of whether he engaged in 'dishonest or fraudulent conduct' as those terms are defined by the bond."¹⁰² They further argued that the other witness's invocation of the privilege on "a wide range of questions" was similarly ambiguous.¹⁰³ The insurers emphasized the danger of unfair prejudice because conduct that could give rise to criminal prosecution and the conduct necessary for coverage under the bond were distinct. The court, however, refused to preclude reference to the witnesses' Fifth Amendment invocations. According to the court:

Admitting reference to the privilege invocations tends to explain why the witnesses are not testifying at trial and suggests that the witnesses may have something to hide. The court recognizes that invocations of the privilege have limited probative value of bond coverage. However, the court finds that reference to the invocations is not unfairly prejudicial because counsel may attempt to explain them. Additionally, the court will consider a jury instruction on this issue, should the parties deem it appropriate.¹⁰⁴

¹⁰⁰*Id.* Nevertheless, the court indicated that a different result might occur if there was no relationship between the person invoking the privilege and the party against whom the invocation was asserted. *Id.*

¹⁰¹87-5488, 1993 WL 411260 (E.D. La. Oct. 7, 1993).

¹⁰²*Id.* at *1.

¹⁰³*Id.*

¹⁰⁴*Id.*

The court thus determined that it would allow reference at trial to the witnesses' invocations of the Fifth Amendment privilege made during their depositions, although it barred as unfairly prejudicial any reference to specific questions asked during the depositions.

Perhaps the most well known case on this issue in the fidelity context is *Federal Deposit Insurance Corporation v. Fidelity & Deposit Company of Maryland*, in which the FDIC, which was appointed as a bank's receiver, sued for recovery under a fidelity bond.¹⁰⁵ F&D argued that the trial court had improperly instructed the jury that it could draw an adverse inference, against a party, from the invocation of the Fifth Amendment by a non-party witness. Specifically, F&D was concerned that the jury had found that the covered employee had committed dishonest acts solely on the basis of his association with witnesses who had invoked the Fifth Amendment. Citing *Baxter*, the Fifth Circuit concluded that because the Fifth Amendment "does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them,"¹⁰⁶ there was no reason "to adopt a rule that would categorically bar a party from calling, as a witness, a non-party who had no special relationship to the party, for the purpose of having that witness exercise his Fifth Amendment right."¹⁰⁷ The court noted, however, that in such cases, before an inference may be drawn against a party, there must be evidence corroborating the inference to be drawn from the witness's invocation of the privilege. Although noting that reliance on an invocation of the Fifth Amendment is subject to the traditional balancing test of Rule 403 of the Federal Rules of Evidence, the court found that any undue prejudice F&D might have faced was avoided by the limiting instruction given by the trial court to the jury to the effect that it could not base any finding of liability solely on a witness's invocation of the Fifth Amendment privilege.

These cases demonstrate the very real possibility that the court will permit the jury to draw an adverse inference against the fidelity insurer from a witness's invocation of the Fifth Amendment privilege. As occurred in *Ralph Hegman Co.*, even jurisdictions requiring a relationship between the witness and the party against whom the inference is to be drawn may find that such a relationship exists between

¹⁰⁵45 F.3d 969, 977-979 (5th Cir. 1995).

¹⁰⁶*Id.* at 977 (quoting *Baxter*, 425 U.S. at 318).

¹⁰⁷*Id.* at 978. The Fifth Circuit discounted F&D's argument that a non-party's invocation of the Fifth Amendment should not be used against a party unless the non-party has a special relationship with the party (e.g., is an agent, employee, officer, director or voting member of the party). *Id.*

the insurer and the allegedly dishonest employee.¹⁰⁸ However, if the person invoking the privilege is a non-covered co-conspirator or mere witness, a relationship argument should fail.

Before any hearing, the fidelity insurer facing claims of employee dishonesty should research the court's position with respect to Fifth Amendment invocations. If it seems likely that a witness will invoke the Fifth Amendment privilege, the insurer should attempt to exclude the witness from testifying on the basis that the witness's testimony, *i.e.*, the invocation of the privilege, is irrelevant and unduly prejudicial. If the insured plans to ask questions during examination of the allegedly dishonest employee (or any other witness) at trial, which it knows will elicit an invocation of the Fifth Amendment, it will not be seeking to elicit "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."¹⁰⁹ Accordingly, the insurer can argue that such questioning should be considered irrelevant and therefore inadmissible.¹¹⁰ At the very least, the insurer should emphasize the danger of unfair prejudice that could result should the jury impermissibly draw a negative inference from the witness's invocation of the Fifth Amendment.¹¹¹

If the court permits the witness to be called, the insurer should object to any attempt to question the witness in open court. Once the witness has been questioned outside of the presence of the jury, and presumably has invoked the Fifth Amendment privilege, counsel may then again argue that the invocation is inadmissible as unduly prejudicial or irrelevant.

Finally, if the court allows the witness to invoke the Fifth Amendment before the jury, or if it determines that evidence of a Fifth Amendment invocation is admissible, counsel should attempt to limit the effects of the invocation. Again, the court's willingness to adopt such limits may vary depending on applicable precedent, as well as the identity of the witness, *i.e.*, whether the invoker is the allegedly dishonest employee, a co-conspirator, or a mere witness. In any case, the insurer should argue that it will be unduly prejudiced as a result of any inferences drawn against it as a result of the witness's invocation of the privilege, and that such

¹⁰⁸198 N.W.2d at 558.

¹⁰⁹See Fed. R. Evid. 401.

¹¹⁰See Fed. R. Evid. 402.

¹¹¹See Fed. R. Evid. 403.

prejudice is not outweighed by the potential probative value of the invocation. Possible arguments may be that the witness is not a party, that there is no relationship between the witness and the insurer, and that corroborating evidence is lacking. If necessary, counsel can also urge the court to give the jury a limiting instruction to insure that they do not draw an impermissible inference from the invocation. Finally, counsel should not forget to preserve objections for possible appeal.

V. Conclusion

In a fidelity case, the Fifth Amendment privilege may be asserted in discovery or at trial, by the allegedly dishonest employee for whose actions coverage is claimed, by alleged co-conspirators of the employee, or even by mere witnesses. Counsel should thus be prepared for such assertions. In the context of discovery or pleadings, the privilege must be invoked with specificity. If the witness attempts a blanket assertion of the privilege, or claims the privilege with respect to even nonincriminating questions, counsel should be prepared to take the matter to the court, which will review the responses to determine if they bear the potential for incrimination. If the witness provides some information or documents, but then attempts to assert the privilege with respect to other matters, counsel should also consider whether the prior responses could be deemed a waiver of the privilege. In any case, counsel should also seek out alternative methods of obtaining the relevant information and documents, such as by contacting the witness's counsel, or by attempting to gain the information from criminal investigators or prosecutors.

At trial, counsel should try to prevent the jury from learning of witnesses' invocations of the Fifth Amendment. If the jury is informed of an invocation, or if the witness pleads the Fifth Amendment on the stand, counsel should strenuously argue that no inference should be drawn against the insurer from the invocation.