CIVIL DISCOVERY WHEN THERE ARE PARALLEL CRIMINAL PROCEEDINGS

Joel M. Androphy
Berg & Androphy
3704 Travis
Houston, Texas 77002
Telephone: (713)529-5622
Facsimile: (713) 529-3785

UNIVERSITY OF TEXAS
SCHOOL OF LAW

BANKRUPTCY LITIGATION: ADVANCED PRE-TRIAL PRACTICE AND PROCEDURE WORKSHOP

EIDMAN COURTROOM
AUSTIN, TEXAS
JANUARY 20-21, 2005

CRIMINAL LIABILITY IN BANKRUPTCY

Chapter 4. Mitigating Criminal Exposure in Bankruptcy Court

L CONSTITUTIONAL CONSIDERATIONS AND PARALLEL PROCEEDINGS

Research References
West's Key Number Digest, Bankruptcy Key 2370

§4:1 Introduction

Criminal penalties may result from the failure to adhere to bankruptcy requirements. The Bankruptcy Code requires that a debtor submit to examination at meetings of creditors, file a list of creditors, file a schedule of assets and liabilities and a statement of affairs, and surrender to the trustee all of the property of the estate, including any recorded information relating to property of the estate There is potential peril in each of these requirements. This chapter discusses whether to file for bankruptcy relief and, if your client does, how to respond to statutory inquiries and at the same time obtain protection from creditors and an ultimate discharge.

§ 4:2 Fifth amendment

The fifth amendment states that, "No person shall be ... compelled in any criminal case to be a witness against himself..."[4] The privilege extends not only to answers that would in and of themselves support a criminal conviction, but also to answers that would furnish a link in the chain of evidence needed to prosecute.[5] The fifth amendment privilege not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution, but also shields him from answering questions in any proceeding, including situations in which he is a debtor or witness in bankruptcy,[6] where the answers might incriminate him in future criminal proceedings or lead to discovery of other incriminatory evidence.[7]

[Section 4:1]
[1] 11 U.S.C.A. §343(1988). [2] 1l U.S.C.A. §521(1) (1988).
[3] 11 U.S.C.A. §521(4) (1988).

[Section 4:2]
[4] U.S. Const. amend. V.
[5] *Doe* v. *U.S.,* 487 U.S. 201, 208, 108 S. Ct. 2341, 2346 n.6, 101 L. Ed. 2d 184, 25 Fed. R. Evid. Serv. 632 (1988); *Maness* v. *Meyers,* 419 U.S. 449, 462, 95 S. Ct. 584, 593, 42 L. Ed. 2d 574 (1975; *Kastigar* v. *U.S.,* 406 U.S. 441, 444-45, 92 S. Ct. 1653, 1656, 32 L. Ed. 2d 212 (1972); *Hoffman* v. *U.S.,* 341 U.S. 479, 486, 71 S. Ct. 814, 818, 95 L. Ed. 1118(1951).
[6] *McCarthy v. Amdstein,* 266 U.S. 34, 45 S. Ct. 16, 69 L. Ed. 158 (1924); *Johnson* v. *U.S.,* 228 U.S. 457, 459, 33 S. Ct. 572, 57 L. Ed. 919 (1913); *In re Martin-Trigona,* 732 F.2d 170, 175, 15 Fed. R. Evid. Serv. 216 (2d Cir. 1984); *Butcher* v. *Bailey,* 753 F.2d 465, 467, 17 Fed. R. Evid. Serv. 254 (6th Cir. 1985), cert. dismissed, 473 U.S. 925, 106 S. Ct. 17, 87 L. Ed. 2d 696 (1985).
[7] *Lefkowitz* v. *Cunningham,* 431 U.S. 801, 805, 97 S. Ct. 2132, 2135, 53 L. Ed. 2d 1 (1977); *Lefkowitz* v. *Tur/ey,* 414 U.S. 70, 94 S. Ct. 316, 38 L. Ed. 2d 274 (1973). See also *Coppola v. Powell,* 878 F.2d 1562, 1565-66 (1st Cir. 1989).
U.S. v. Stein, 233 F.3d 6 (1st Cir. 2000), cert. denied, 532 U.S. 943, 121 S. Ct. 1406, 149 L. Ed. 2d 348 (2001) (Fifth amendment privilege against compelled self-incrimination did not bar the use of statements, which were made to avoid a negative inference in a disciplinary hearing, from being used in the subsequent bankruptcy proceeding.).

§ 4:3 —Scope

Frequently, courts are concerned that a debtor may be using the fifth amendment merely to avoid inquiry by creditors. The fifth amendment privilege only protects the witness against compelled testimonial or communicative self-incrimination. Being compelled to testify about your finances is not always protected. The disclosures must pose some real, not imaginary, threat of incrimination.[9] The courts reject blanket assertions of the fifth amendment privilege.[10] A court's subjective assessment of the likelihood of prosecution, however, is not controlling.11 As long as the debtor can demonstrate some possibility of prosecution beyond imagination and fancy, a fifth amendment claim should not be disregarded.

§4:4 ---------- Schedules

A debtor cannot assert the fifth amendment privilege concerning all matters contained in the bankruptcy schedules.[12] On the other hand, the debtor is not required to prove the hazards of incrimination in detail, which, of course, would require him to surrender the very protection the privilege guarantees.[1] He must, however, be prepared to explain why every facet of his personal and business practices would be incriminatory. For example, if the F.B.I. is investigating your debtor client for securities violations, be prepared to explain why listing his residence and car would be incriminatory.

On the other hand, avoid disclosing innocent facts, the details of which may be incriminatory. You may unintentionally waive the privilege.[14] For example, listing a bank as a creditor may waive the privilege with regard to the factual circumstances surrounding the obligation, including the fact that the client may have submitted a false statement to obtain a loan. This example may stretch the concept of waiver, but always err on the side of conservative answers.

[Section 4:3]

[8] *Fisher v. U.S.*, 425 U.S. 391, 397-99, 96 S. Ct. 1569, 1574-75, 48 L. Ed. 2d 39 (1976); *Schmerber v. California*, 384 U.S. 757, 761, 86 S. Ct. 1826, 1830-31, 16 L. Ed. 2d 908 (1966); *In re Litton*, 74 B.R. 557, 559 (Bankr. CD. III. 1987).

[9] *Hoffman v.* US., 341 U.S. 479, 486, 71 S. Ct. 814, 818, 95 L. Ed. 1118 (1951; *In re Morganroth*, 718 F.2d 161, 167, 14 Fed. R. Evid. Serv. 187 (6th Cir. 1983).

[10] *US.* v. *Goodwin*, 625 F.2d 693, 700-01 (5th Cir. 1980); *US.* v. *Hatchett*, 862 F.2d 1249, 1251 (6th Cir. 1988); *U.S.* v. *Mahar*, 801 F.2d 1477, 1495, 21 Fed. R. Evid. Serv. 832 (6th Cir. 1986).

[1] *U.S. v. Grable*, 98 F.3d 251, 257, 1996 FED App. 333P (6th Cir. 1996) (holding that it is for the court to decide whether a witness' silence is justified and to require him to answer if it clearly appears to the court that the witness asserting the privilege is mistaken as to its validity. The court must permit the witness to assert the privilege with respect to particular questions, and in each instance, the court must determine the propriety of the refusal to testify) (citing *In re Morganroth*, 718 F.2d 161, 167, 14 Fed. R. Evid. Serv. 187 (6th Cir. 1983); *In re Corrugated Container Antitrust Litigation*, 661 F.2d 1145, 1150, 9 Fed. R. Evid. Serv. 289 (7th Cir. 1981), cert. granted, 454 U.S. 1141, 102 S. Ct. 998, 71 L. Ed. 2d 292 (1982) and judgment aff'd, 459 U.S. 248, 103 S. Ct. 608, 74 L. Ed. 2d 430, 12 Fed. R. Evid. Serv. 1 (1983).

[Section 4:4]

[12] *In re John Lakis, Inc.*, 228 F. Supp. 918, 920 (S.D.N.Y. 1964).

[13] *Hoffman* v. *U.S.*, 341 U.S. 479, 486, 71 S. Ct. 814, 818, 95 L. Ed. 1118 (19510; *New York State Nat. Organization for Women v. Terry*, 886 F.2d 1339, 1356-57, 14 Fed. R. Serv. 3d 922 (2d Cir. 1989).

[14] *In re Corrugated Container Antitrust Litigation*, 661 F.2d 1145, 1155, 1183, 9 Fed. R. Evid. Serv. 289 (7th Cir. 1981), cert. granted, 454 U.S. 1141, 102 S. Ct. 998, 71 L. Ed. 2d 292 (1982) and judgment aff'd, 459 U.S. 248, 103 S. Ct. 608, 74 L. Ed. 2d 430, 12 Fed. R. Evid. Serv. 1 (1983) (quoting *Rogers* v. *U.S.*, 340 U.S. 367, 373, 71 S. Ct. 438, 442, 95 L. Ed. 344, 19 A.L.R.2d 378 (1951).

Title search: Civil Discovery When There Are Parallel Criminal Proceedings

First appeared as part of the conference materials for the
2005 Bankruptcy Litigation: Advanced Pre-Trial Practice and Procedure Workshop session
"Civil Discovery When There Are Parallel Criminal Proceedings"