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Truth or Consequences: The Dilemma of Asserting the Fifth Amendment Privilege Against Self-Incrimination in Bankruptcy Proceedings

Craig Peyton Gaumer
District of South Dakota

Charles L. Nail Jr.
U.S. Bankruptcy Court, District of South Dakota

Craig Peyton Gaumer*
Charles L. Nail, Jr.**

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TABLE OF CONTENTS

* Assistant U.S. Attorney, District of South Dakota; Contributing Editor, *American Bankruptcy Institute Journal*. Former Law Clerk to the Honorable Frank W. Koger, Chief Judge, Bankruptcy Appellate Panel for the U.S. Court of Appeals for the Eighth Circuit, and Chief Judge, U.S. Bankruptcy Court, Western District of Missouri. J.D., 1989, Washington University; B.A., 1984 (Journalism), M.A., 1986 (Sociology), Eastern Illinois University.

** Clerk, U.S. Bankruptcy Court, District of South Dakota. Former Assistant U.S. Trustee, Districts of North Dakota and South Dakota. J.D., University of Minnesota, 1982 (magna cum laude); B.S., University of South Dakota, 1979 (Political Science and English).

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I. INTRODUCTION

The Fifth Amendment to the United States Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." An individual may assert this privilege against self-incrimination at any stage in a criminal or a civil proceeding, including a bankruptcy proceeding.[1]

The primary purpose of the privilege against self-incrimination is to "avoid confronting the witness with the 'cruel trilemma' of self-accusation, perjury or contempt."[2] In a criminal case, an individual who successfully invokes the privilege need not choose among these equally unattractive alternatives. He may remain silent, leaving the government to meet its burden of proof without his forced assistance.[3] It is of no concern that the individual may be guilty of the offense with which he is charged.[4] "[It is] better for an occasional crime to go unpunished than that the prosecution should be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused."[5]

In a civil case, however, an individual who asserts her Fifth Amendment rights may be confronted with an additional dilemma. If she chooses to remain silent to avoid potential criminal liability, she may jeopardize her civil action or defense. On the other hand, if she testifies in support of her civil action or defense, she may expose herself to the risk of making potentially incriminating statements that the government could use against her in a subsequent criminal proceeding.

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1. *See* Lefkowitz v. Turley, 414 U.S. 70, 77 (1973); McCarthy v. Arndstein, 266 U.S. 34, 40 (1924); Martin-Trigona v. Belford (*In re* Martin-Trigona), 732 F.2d 170, 175 (2d Cir. 1984); Charter Fed. Sav. Ass'n v. Rezak (*In re* Lederman), 140 B.R. 49, 52 (Bankr. E.D.N.Y. 1992); Marine Midland Bank, N.A. v. Endres (*In re* Endres), 103 B.R. 49, 53 (Bankr. N.D.N.Y. 1989); Olson v. Potter (*In re* Potter), 88 B.R. 843, 849 (Bankr. N.D. Ill. 1988); *In re* Connelly, 59 B.R. 421, 430 (Bankr. N.D. Ill. 1986). *Cf.* FED. R. EVID. 501 (general rule on privileges); FED. R. BANKR. P. 9017 (evidence).
2. Martin-Trigona v. Belford (*In re* Martin-Trigona), 732 F.2d 170, 174 (2d Cir. 1984)(quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964)).
3. *In re* Hulon, 92 B.R. 670, 673 (Bankr. N.D. Tex. 1988)(citing Malloy v. Hogan, 378 U.S. 1, 7 (1964)).
4. Unlike the Fourth Amendment, which serves to protect both the guilty and the innocent from unreasonable searches and seizures, the Fifth Amendment privilege against self-incrimination primarily serves to protect the guilty. Marine Midland Bank, N.A. v. Endres (*In re* Endres), 103 B.R. 49, 53 (Bankr. N.D.N.Y. 1989). "[T]he privilege [against self-incrimination] is designed to protect the testimony of a party or non-party witness *which might later tend to subject that person to criminal prosecution.*" *Id.* (alterations in original)(emphasis added). *See also* Lefkowitz v. Cunningham, 431 U.S. 801, 808 (1977); McCarthy v. Arndstein, 266 U.S. 34, 40 (1924).
5. United States v. Yurasovich, 580 F.2d 1212, 1215 (3d Cir. 1978)(quoting Maffie v. United States, 209 F.2d 225, 227 (1st Cir. 1954)).

This dilemma frequently arises in bankruptcy cases. The "right to remain silent" is often in direct conflict with a bankruptcy debtor's obligation to disclose the particulars of his financial affairs.[6] "[T]he bankruptcy process places greater emphasis on full disclosure of an individual's financial affairs for the benefit of all creditors of the debtor's estate and thus affords the debtor only a thin shield against wide-ranging discovery."[7]

Such a conflict may arise in connection with, among other things, the preparation and filing of the debtor's schedules and statements;[8] the debtor's testimony at the meeting of creditors;[9] the debtor's testimony at any examination ordered by the court;[10] the debtor's response to a complaint either to determine the dischargeability of a debt[11] or to deny the debtor a discharge;[12] the debtor's efforts to confirm a plan of reorganization;[13] the debtor's preparation and filing of periodic operating reports;[14] the debtor's response to a motion to convert or dismiss the case;[15] and the debtor's response to a motion to appoint a trustee or examiner[16] or to remove the debtor as debtor in possession.[17]

The debtor is not the only party protected by the Fifth Amendment privilege. The same sort of conflict between the right to remain silent and the bankruptcy process also may arise in connection with such other matters as a Chapter 7 trustee's response to a motion to remove the trustee[18] or an objection to a creditor's proof of claim.[19]

As the number of bankruptcy cases filed in the United States continues to hover near the one-million-a-year mark, simple statistics suggest that the number of persons involved in the bankruptcy process with potential criminal problems will increase. These bankrupt individuals and third parties who bring a history of questionable conduct into bankruptcy proceedings not only must contend with credi-

6. By contrast, "[t]he former Bankruptcy Act provided that '[no] testimony given by [a debtor] shall be offered in evidence against [a debtor] in any criminal proceeding." *In re* Hulon, 92 B.R. 670, 673 (N.D. Tex. 1988)(quoting Glickstein v. United States, 222 U.S. 139, 140-41 (1911)).
7. *Id.*
8. *See* 11 U.S.C. § 521 (1994); FED. R. BANKR. P. 1007.
9. *See* 11 U.S.C. §§ 341, 343 (1994); FED. R. BANKR. P. 2003.
10. *See* FED. R. BANKR. P. 2004-2005.
11. *See* 11 U.S.C. § 523 (1994); FED. R. BANKR. P. 4007.
12. *See* 11 U.S.C. §§ 727, 1141 (1994); FED. R. BANKR. P. 4004.
13. *See* 11 U.S.C. §§ 1129, 1225, 1325 (1994); FED. R. BANKR. P. 3020.
14. *See* 11 U.S.C. §§ 704(8), 1106(a)(1), 1107(a), 1203, 1304(c) (1994); FED. R. BANKR. P. 2015.
15. *See* 11 U.S.C. §§ 707(a), 1112, 1208, 1307 (1994); FED. R. BANKR P. 1017, 1019.
16. *See* 11 U.S.C. § 1104 (1994); FED. R. BANKR. P. 2007.1.
17. *See* 11 U.S.C. § 1204 (1994).
18. *See id.* § 324.
19. *See id.* §§ 501–502; FED. R. BANKR. P. 3001-3005, 3007.

tors and bankruptcy trustees who might pursue civil remedies against them, they also likely have to contend with the United States Department of Justice, which has stepped up its efforts to combat criminal bankruptcy fraud.[20] Under the circumstances, bankruptcy practitioners are well-advised to become more familiar with the nuances of the Fifth Amendment.

To assist them in this regard, this Article discusses both the manner in which issues regarding the Fifth Amendment privilege against self-incrimination may arise in bankruptcy cases and the many potential consequences of asserting the privilege. Parts II and III provide a general overview of the bankruptcy process and the Fifth Amendment, respectively. Part IV examines whether and to what extent the privilege against self-incrimination protects corporations and their directors, officers, and shareholders. Part V offers a similar examination of the extent to which the Fifth Amendment protects against the compelled production of documents. Parts VI and VII address the closely related topics of invocation and waiver of the privilege. Part VIII analyzes what may well be the most serious potential consequence of invoking the privilege—the court's drawing an adverse inference against the individual choosing to remain silent. Part IX analyzes other, at least arguably, less serious potential consequences when the court draws such inferences. Part X discusses the question of whether a bankruptcy court can and should stay bankruptcy proceedings pending the outcome of criminal proceedings against an individual who invokes the privilege against self-incrimination during a bankruptcy proceeding. Finally, Part XI deals with immunity, an often suggested but seldom granted means of resolving the inherent conflict between the individual's right to remain silent and other parties' interests in full disclosure.

II. OVERVIEW OF BANKRUPTCY LAW

The dramatic increase in the number of bankruptcy filings over the past ten years has correspondingly produced an increase in the number of attorneys who represent clients in bankruptcy cases. Participants in the bankruptcy process thus may range in experience from recent law school graduates and sole practitioners who have had limited contact with the bankruptcy system to bankruptcy specialists who devote most, if not all, of their time to the practice. This Part serves as both an introduction to bankruptcy law for less experienced practitioners and a refresher course on the historical purpose and cur-

20. *See* Craig Peyton Gaumer, *Operation Total Disclosure: A Commentary on the U.S. Department of Justice and the Prosecution of Bankruptcy Crimes*, 15 AM. BANKR. INST. J. 10 (1996).

rent operation of the American bankruptcy system for more seasoned attorneys.

To better understand the controversies created when an individual participating in the bankruptcy process asserts the Fifth Amendment privilege against self-incrimination, it is helpful to comprehend the historical origins of the federal bankruptcy power, its limits and breadth, and the manner in which it is currently exercised under Title 11 of the United States Code.

The various American bankruptcy systems that have been created by Congress over the past two centuries are the products of two distinct provisions of the United States Constitution. Article I grants Congress the express authority to create courts inferior to the United States Supreme Court.[21] Article I also confers the power to establish uniform laws on the subject of bankruptcies.[22] Beginning in 1800, Congress has exercised these powers to create five successive systems of bankruptcy laws: the Bankruptcy Act of 1800;[23] the Bankruptcy Act of 1841;[24] the Bankruptcy Act of 1867;[25] the Bankruptcy Act of 1898;[26] and the Bankruptcy Reform Act of 1978,[27] which created the current bankruptcy system.

Article I, Section 8, Clause 4 of the Constitution empowers Congress to pass uniform laws on the subject of bankruptcy, but provides no definition for the concept of "bankruptcy." To understand the boundaries of the bankruptcy power, it is therefore necessary to appreciate the historical nature and development of bankruptcy law.[28]

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21. U.S. CONST. art. I, § 8, cl. 9.
22. U.S. CONST. art. I, § 8, cl. 4.
23. Bankruptcy Act of 1800, ch. 19, 2 Stat. 19, *repealed by* Act of Dec. 19, 1803, ch. 6, 2 Stat. 248.
24. Bankruptcy Act of 1841, ch. 9, 5 Stat. 440, *repealed by* Act of March 3, 1843, ch. 82, 5 Stat. 614.
25. Bankruptcy Act of 1867, ch. 176, 14 Stat. 517, *amended by* Act of June 22, 1874, ch. 390, 18 Stat. 178, *repealed by* Act of June 7, 1878, ch. 170, 20 Stat. 99.
26. Bankruptcy Act of 1898 (Nelson Act), ch. 541, 30 Stat. 544, *amended by* Chandler Act of 1938, ch. 575, 52 Stat. 840, *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549. The Act of 1898 was used largely for personal and business liquidations and business reorganizations. Personal reorganizations were uncommon.
27. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, *amended by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, and *amended by* Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088.
28. *See generally* Louis E. Levinthal, *The Early History of Bankruptcy Law*, 66 U. PA. L. REV. 223 (1919). *See also* DOUGLAS G. BAIRD & THOMAS H. JACKSON, CASES, PROBLEMS, AND MATERIALS ON BANKRUPTCY 20-30 (1985); DOUGLAS G. BAIRD & THOMAS H. JACKSON, CASES, PROBLEMS, AND MATERIALS ON BANKRUPTCY 26-37 (2d ed. 1990)[hereinafter BAIRD & JACKSON II]; ROBERT L. JORDAN & WILLIAM D. WARREN, BANKRUPTCY 17-20 (1985); CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY (1935); ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE LAW OF DEBTORS AND CREDITORS 169-74 (1986).

To the extent that bankruptcy is considered simply a process whereby a person is released from her debts, its genesis can be traced to Biblical times. While the concept of discharging the downtrodden from their debts may have Judeo-Christian origins, it was given serious sanction in civil law[29] by the Romans. During the reign of Julius Caesar, the Romans enacted a law called "Cessio Bonorum," or "the law relating to assignments for the benefit of creditors."[30] The term "bankruptcy" descends from statutes of fourteenth century Italian city-states known as "banca rupta," a term that referred to a "medieval custom of breaking the bench of a banker or tradesman who absconded with property of his creditors."[31]

Yet, as is the case with much of America's constitutional jurisprudence, the origins of the Bankruptcy Clause can be traced to English law.[32] The first English bankruptcy laws, enacted in 1542 during the reign of King Henry VIII, were quasicriminal in nature.[33] The Statute of Bankrupts, enacted during the reign of Queen Elizabeth in 1570, applied only to merchants and was punitive in nature.[34] English bankruptcy laws became more humane as time passed. The first law granting a debtor a discharge of debts owing at the time of filing, with certain conditions, was enacted during the rule of Queen Anne in the eighteenth century.[35]

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29. As used here, the term civil law refers to statutes created by the political sovereign, as opposed to laws established by divine edict.
30. 1 HAROLD REMINGTON, A TREATISE ON THE BANKRUPTCY LAW OF THE UNITED STATES § 1, at 5 (J. Henderson ed., 5th ed. 1950).
31. BAIRD & JACKSON II, *supra* note 28, at 27 (citing Israel Treiman, *Acts of Bankruptcy: A Medieval Concept in Modern Bankruptcy Law*, 52 HARV. L. REV. 189 (1938-39)). *See also* JORDAN & WARREN, *supra* note 28, at 17 (explaining the origin of the term bankruptcy).
32. *See generally* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5 (1995); Israel Tremain, *Escaping the Creditor in the Middle Ages*, 43 LAW Q. 230 (1927)(explaining the origins of English bankruptcy law).
33. Tabb, *supra* note 32, at 7 (citing 34 & 35 Hen. 8, ch. 4 (1542-43)(Eng.)). *See also* Levinthal, *supra* note 28, at 16-18.
34. JORDAN & WARREN, *supra* note 28, at 18 (citing 12 Eliz., ch. 7 (1570)(Eng)).
35. *Id.* at 19 (citing the Statutes of Anne, 4 Anne, ch. 17 (1705)(Eng.), and 10 Anne, ch. 15 (1711)(Eng.)). One commentator explains the origins of the English discharge as follows:

> The discharge was the result of the gradual realization of the fact that in many cases the bankrupt might be properly an object of pity, and that the unlimited incarceration of the debtor did not tend to reimburse the creditors at all. The case was first strongly put in a certain Declaration and Appeal drawn up in 1645 and signed by a hundred debtors confined in the Fleet. They were the spokesmen of a large number of persons, as they estimated that there were 8000 debtors thus confined through England and Wales, who urged that the treatment to which they were subjected was unconstitutional. In 1648, when prices were very high, the sufferings of the prisoners were notoriously severe. It was not until September and December, 1649, that acts were passed providing for the dis-

The subject of bankruptcy law was discussed only briefly at the Constitutional Convention that met in Philadelphia during the summer of 1787. The Convention was convened to revise the Articles of Confederation, but instead produced the current United States Constitution.[36] The topic, however, did come up later.

On August 29, 1787, Charles Pinkney proposed adding the following clause to the new constitution: "to establish uniform laws upon the subject of bankruptcies, and respecting the damages arising on the protest of foreign bills of exchange."[37] Pinkney's suggestion was referred to a subcommittee,[38] which issued a favorable report on the recommendation just three days later.[39] The proposed bankruptcy clause was briefly debated by the Convention on Monday, September 3, 1787, and then approved by an overwhelming majority.[40]

Few voices were raised in opposition to the Bankruptcy Clause.[41] One person expressed fear that the states would be prohibited from

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charge of poor persons unable to pay their creditors; prisoners whose possessions were not worth more than five pounds, besides their clothes and tools, were to take an oath to that effect before justices, and after due notice was served on the creditors, the prisoners were to be discharged.

The Acts of Anne provided that honest insolvents should be granted their discharge if they complied with the requirements of the law. This provision was probably the consequence not only of pity, but also of the feeling that mercantile credit is given in the interest of the creditor as well as of the debtor; that the giving of credit necessarily involves some risk; that it should be the business of the trader to insure against this loss by adding a percentage for the credit which he advances; and that all the debtor ought to pledge is his estate, not his future earnings, and certainly not his personal liberty.

Levinthal, *supra* note 28, at 18-19. *See also* Jay Cohen, *The History of Imprisonment for Debt and Its Relation to the Development of Discharge in Bankruptcy*, 3 J. LEGAL HIST. 153 (1982).

36. James Madison recorded the events and debates of the Constitutional Convention. *See* 1 JAMES MADISON, THE JOURNAL OF THE DEBATES IN THE CONVENTION WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES 13-19 (Gaillard Hunt ed., 1908). The Virginia Plan, which was written primarily by James Madison, is often referred to as the "Large States' Plan." The South Carolina Plan is known as the "Small States' Plan." The proposal for a new constitution offered by Alexander Hamilton would have implicitly given Congress the power to enact bankruptcy laws if it deemed them necessary. *Id.* at 172. Article VII of the Hamilton Plan suggested that "[t]he Legislature of the United States shall have power to pass all laws which they shall judge necessary to the common defence and general welfare of the Union." *Id.*

37. 2 *id.* at 267.

38. *Id.*

39. *Id.* at 292.

40. Nine states voted for the clause—Georgia, Maryland, Massachusetts, New Hampshire, New Jersey, North Carolina, Pennsylvania, South Carolina, and Virginia. Only Connecticut voted against it. *Id.* at 294.

41. The only widely read Anti-Federalist who discussed the subject at length, "the Federalist Farmer," vacillated on the issue. In some letters, the Farmer seemed to support the concept of a bankruptcy clause. *See* 2 THE COMPLETE ANTI-FEDER-

passing debt relief laws because the Bankruptcy Clause arguably could be interpreted as granting to the federal government exclusive jurisdiction in this area.[42] This did not prove to be the case, however, as states were and are free to legislate in the area of debt relief so long as their efforts do not run afoul of the Supremacy Clause.

In exercising the power granted to it by the Bankruptcy Clause, Congress has steadily distanced American bankruptcy law from its historical roots in criminal proceedings. In the process, bankruptcy

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ALIST 229-30 (Herbert J. Storing ed., 1981)(1787-1788)(Letters from the Federal Farmer, October 8, 1787). For example, in one such letter, he provided the following explanation:

> I am not sufficiently acquainted with the laws and internal police of all the states to discern fully, how general bankrupt laws, made by the union, would effect them, or promote the public good. I believe the property of debtors, in the several states, is held responsible for their debts in modes and forms very different. If uniform bankrupt laws can be made without producing real and substantial inconveniences, I wish them to be made by congress.

Id. In contrast, in a letter written on January 25, 1788, the Farmer expressed a different opinion on the subject:

> [I]t does not appear to me, on further reflection, that the union ought to have the power, it does not appear to me to be a power properly incidental to a federal head, and, I believe, no one ever possessed it; it is a power that will immediately and extensively interfere with the internal police of the separate states, especially with their administering justice among their citizens. By giving this power to the union, we greatly expand the jurisdiction of the federal judiciary, as all questions arising on bankrupt laws, being laws of the union, even between citizens of the same state, may be tried in the federal courts; and I think it may be shewn, that by the help of these laws, actions between citizens of different states, and the laws of the federal city, aided by no overstrained judicial fictions, almost all civil causes may be drawn into those courts.

Id. at 344.

42. The Anti-Federalist "Deliberator" warned that "[n]o state can given [sic] relief to insolvent debtors, however distressing their situation may be; since Congress will have the exclusive right of establishing uniform laws on the subject of bankruptcies throughout the United States." 3 *id.* at 180. The Federal Farmer raised the same concern.

> By article I, section 8, congress shall have power to establish uniform laws on the subject of bankruptcies, throughout the United States. It is to be observed, that the separate states have ever been in possession of the power, and in the use of it, of making bankrupt laws . . . . [N]o words are used by the constitution to exclude the jurisdiction of the several states, and whether they will be excluded or not, or whether they and the union will have concurrent jurisdiction or not, must be determined by inference; and from the nature of the subject; if the power, for instance, to make uniform laws on the subject of bankruptcies, is in its nature indivisible, or incapable of being exercised by two legislatures independently, or by one in aid of the other, then the states are excluded, and cannot legislate at all on the subject, even though the union should neglect or find it impracticable to establish uniform bankrupt laws. How far the union will find it practicable to do this, time only can fully determine.

2 *id.* at 343-44 (Letters from the Federal Farmer, January 25, 1787).

has evolved into an equitable proceeding[43] that is much more debtor-friendly than its predecessors.

The Bankruptcy Act of 1898 (the Bankruptcy Act), as amended, was the first modern bankruptcy law. It remained in effect for more than eighty years, longer than any other bankruptcy law in the United States. Under the Bankruptcy Act, liquidation and reorganization took place in the federal district court under the direction and supervision of bankruptcy referees. After the United States endured numerous periods of economic change, the Bankruptcy Act became the subject of increased debate in the late 1960s and early 1970s.[44] The Bankruptcy Act finally was repealed by the Bankruptcy Reform Act of 1978, which enacted the current Bankruptcy Code.[45] As amended, the Bankruptcy Code remains the law of the land, although federal courts

43. After almost 100 years of drawing a distinction between courts of bankruptcy and courts of equity, the United States Supreme Court first referred to the bankruptcy court as a "court of equity" in *Barton v. Barbour*, 104 U.S. 126 (1881). In explaining the power conferred upon the bankruptcy court, Justice Woods stated in dicta that

> in cases of bankruptcy, many incidental questions arise in the course of administering the bankruptcy estate, which would ordinarily be pure cases at law, and in respect of their facts triable by jury, but, as belonging to the bankruptcy proceedings, they become cases over which the bankruptcy court, which acts as a court of equity, exercises exclusive control. Thus a claim of debt or damages against the bankruptcy is investigated by chancery methods. The bankruptcy court may, and in cases peculiarly requiring such a course will, direct an action or an issue at law to aid it in arriving at a right conclusion. But this rests in its sound discretion.

Id. at 134. But, in *Pepper v. Litton*, 308 U.S. 295 (1939), the Supreme Court, while conceding that some of its early decisions had described bankruptcy proceedings as inherently equitable in nature, emphasized that § 1 and § 2 of the Bankruptcy Act of 1898 invested the bankruptcy court "with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings." *Id.* at 304. Even though many, if not most, issues decided by bankruptcy judges involve statutory interpretation, the perception of bankruptcy courts as courts of equity persists.

44. In the late 1960s, the Brookings Institute conducted an important study of the bankruptcy system, the results of which were published in 1971. DAVID T. STANLEY & MARJORIE GIRTH, BANKRUPTCY: PROBLEM, PROCESS, REFORM (Brookings Inst. 1971).

45. Subsequent references to the "Bankruptcy Code" or "Code" refer to the 1978 Act. The original reform bill was introduced by the Commission to the 93d Congress, as H.R. 10792 and S. 2565. The National Conference of Bankruptcy Judges disagreed with many of the proposed provisions and, in response, drafted its own alternative Act. Both bills were then introduced in the 94th Congress, and after extensive hearings, a synthesis bill was drafted and introduced in the 95th Congress. In 1978, the bill, S. 2266, was passed in the form of an Amendment to H.R. 8200. After both the Senate and House passed additional amendments, H.R. 8200 was finally passed by the Senate on October 5, 1978, and by the House on October 6, 1978. The new Act become applicable to all cases filed after October 1, 1979. Martin I. Klein, *The Bankruptcy Reform Act of 1978*, 53 AM. BANKR. L.J. 3 (1979).

still rely on principles developed under the Bankruptcy Act to interpret parallel provisions of the Bankruptcy Code.[46]

The Bankruptcy Code originally provided four distinct forms of relief: Chapter 7 (liquidation);[47] Chapter 9 (adjustment of debts of a municipality);[48] Chapter 11 (reorganization);[49] and Chapter 13 (adjustment of debts of an individual with regular income).[50] In 1986, the Code was amended to provide a fifth form of relief, Chapter 12 (adjustment of debts of a family farmer with regular annual income).[51]

Structurally, the Bankruptcy Code is divided into eight chapters. The first three Chapters (1, 3, and 5) are procedural. Each of the remaining five Chapters (7, 9, 11, 12, and 13) provides for and governs one of the forms of relief mentioned above. Chapter 1[52] includes definitions, rules of construction, and other general provisions that are applicable to cases filed under any of the relief chapters.[53] Chapters 3[54] and 5[55] contain various provisions governing case administration, creditors, debtors, and the estate, which apply to cases filed under Chapters 7, 11, 12, and 13.[56]

Every bankruptcy case begins with the filing of a bankruptcy petition.[57] Depending upon the circumstances and the chapter under which the petition is filed, a petition may be either voluntary or involuntary,[58] and individual or joint.[59] The debtor must be eligible for

46. In *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552, 553 (1990), the United States Supreme Court noted that the Bankruptcy Code should not be read to "erode past bankruptcy practice absent a clear indication that Congress intended such a departure." While the Court left open the question of what constitutes such a "clear indication" of congressional intent, *Davenport* can be read as standing for the general proposition that some principles that evolved under the Bankruptcy Act retain their validity under the Bankruptcy Code. As a result, a practitioner with some understanding of the Bankruptcy Act may be able to use these principles to advance her client's cause in a case under the Bankruptcy Code.
47. 11 U.S.C. §§ 701-766 (1994).
48. *Id.* §§ 901-946.
49. *Id.* §§ 1101-1174.
50. *Id.* §§ 1301-1330.
51. *Id.* §§ 1201-1231.
52. *Id.* §§ 101-110.
53. *Id.* § 103(a), (e).
54. *Id.* §§ 301-366.
55. *Id.* §§ 501-560.
56. *Id.* § 103(a).
57. *See id.* § 301. A petition seeking relief under the Bankruptcy Code is a formal request for protection and the commencement of the bankruptcy case. A filing fee, which varies in amount depending upon the chapter under which the petition is filed, must accompany the petition. *See* 28 U.S.C. § 1930(a) (1994).
58. *See* 11 U.S.C. §§ 301, 303 (1994). A voluntary petition is filed by the debtor. An involuntary petition is filed by one or more of the debtor's creditors, or if the debtor is a partnership, by fewer than all of the debtor's general partners. *Id.*

relief under the chapter under which the petition is filed.[60] Upon the filing of a petition for relief, two significant events instantly transpire as a matter of law—an "estate" is created,[61] and an "automatic stay" goes into effect.[62]

The bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case."[63] The estate also includes the debtor's and the debtor's spouse's interests in certain community property; property the trustee recovers on behalf of the estate; certain property preserved for the estate or ordered transferred to the estate; property acquired by the debtor within 180 days after the filing of the petition by bequest, devise, or inheritance, pursuant to a property settlement or divorce decree, or as beneficiary of a life insurance policy or death benefit plan; proceeds, product, offspring, rents, and profits from property of the estate; and any property

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§ 303(b). If the debtor has fewer than 12 creditors, a single creditor with a claim totaling $10,000 may file the involuntary petition. *Id.* § 303(b)(2). If the debtor has 12 or more creditors, three or more creditors with claims totaling $10,000 must file the involuntary petition. *Id.* § 303(b)(1). An involuntary petition may be filed only under Chapters 7 and 11 against a debtor that is not a farmer, family farmer, or a corporation that is not a moneyed, business, or commercial corporation. *Id.* § 303(a).

59. *See id.* § 302. A joint petition is a single petition filed by an individual debtor and her spouse.

60. *See id.* § 109. Any "person" that is not a railroad, an insurance company, or a proscribed financial institution may be a Chapter 7 debtor. *Id.* § 109(b). For the purposes of determining eligibility to file a bankruptcy petition, "person" includes individuals, partnerships, and corporations, but not governmental units. *See id.* § 101(41). Only a municipality that is insolvent and that is permitted under state law to proceed under Chapter 9 may be a Chapter 9 debtor. *Id.* § 109(c). Any person who is eligible for relief under Chapter 7, other than a stockbroker or a commodity broker, may be a Chapter 11 debtor. *Id.* § 109(d). In addition, railroads may be Chapter 11 debtors. *Id.* Only a "family farmer" with regular annual income may be a Chapter 12 debtor. *Id.* § 109(f). A "family farmer" is an individual whose debts do not exceed $1,500,000, at least 80% of whose debts arose from the farming operation, and more than 50% of whose gross income in the taxable year preceding the taxable year in which the Chapter 12 petition was filed derived from farming, or a corporation or partnership that meets a similar, but separate, set of requirements. *Id.* § 101(18). Only an individual with regular income who has noncontingent, liquidated, unsecured debt of less than $250,000, and noncontingent, liquidated, secured debt of less than $750,000 may be a Chapter 13 debtor. *Id.* § 109(e). Finally, no one who was a debtor in a case pending at any time in the 180 preceding days may be a debtor under any chapter, if the prior case was dismissed because of the debtor's willful failure to abide by an order of the court or pursuant to the debtor's request following the filing of a motion for relief from the automatic stay. *Id.* § 109(g).

61. *Id.* § 541(a).

62. *Id.* § 362(a).

63. *Id.* § 541(a)(1). In essence, with only limited exceptions, the estate steps into the debtor's shoes with respect to any property, whether tangible or intangible, in which the debtor had any interest, whether legal or equitable, on the date the petition was filed. *See id.* § 541(a)(6), (b)(1)-(5), (c)(2).

that the estate acquires after the filing of the petition.[64] The debtor is permitted to "exempt" certain property, which has the effect of removing that property from the estate.[65]

In Chapter 7 cases, a trustee is appointed to take possession and serve as the representative of the estate.[66] In Chapter 11, 12, and 13 cases, the debtor ordinarily remains in possession of the estate and is responsible for its administration.[67] Under certain circumstances, however, the bankruptcy court may order the removal of a Chapter 11 or 12 "debtor in possession" and appoint a trustee to take possession of and assume the responsibility for administering the estate.[68] Upon the dismissal of a case or confirmation of a Chapter 11, 12, or 13 plan of reorganization, property of the estate ordinarily revests in the debtor.[69]

The second significant event that occurs upon the filing of a petition for relief is the imposition of the automatic stay, a form of injunctive relief that prohibits creditors from taking certain actions against the debtor or the property of the estate.[70] The automatic stay does not, however, enjoin all actions against the debtor. For example, it does not prevent the government from commencing or continuing criminal proceedings against the debtor.[71]

The purpose of the automatic stay is to maintain the status quo. In reorganization cases, the stay permits the debtor to put together a plan of reorganization without having to deal with demand letters, lawsuits, and other collection efforts. In Chapter 7 cases, the stay allows the trustee to identify, collect, and liquidate the property of the estate without interference from creditors trying to enforce their judgments and liens.

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64. *See id.* § 541(a)(2)-(7).
65. *See id.* § 522(b). Unless the state in which the debtor is domiciled has "opted out" of the federal exemptions, *see id.* § 522(b)(1), the debtor may claim either the federal exemptions listed in § 522(d), or the exemptions provided under other federal law and the law of the state in which she is domiciled. *See id.* § 522(b). Typically, exempt property includes the basic necessities of life, which are considered essential to the debtor's "fresh start."
66. *See id.* §§ 323, 701-704.
67. *See id.* §§ 1107, 1203, 1303-1304.
68. *See id.* §§ 1104, 1204. Among the grounds for such relief are fraud, dishonesty, incompetence, and gross mismanagement.
69. *See id.* §§ 349(b)(3), 1141(b), 1227(b), 1327(b).
70. *See id.* § 362(a). Among the prohibited actions are commencing or continuing judicial proceedings against the debtor; enforcing prepetition judgments against the debtor; creating, perfecting, or enforcing liens against property of the estate; and attempting to collect prepetition claims against the debtor.
71. *See id.* § 362(b)(1). Other actions that are not stayed include commencing or continuing paternity proceedings; collecting alimony, maintenance, or support from property that is not property of the estate; and commencing or continuing proceedings to enforce a governmental unit's police or regulatory power. *See id.* § 362(b)(2)-(18).

Regardless of the chapter under which the petition is filed, the automatic stay remains in effect with respect to actions against property of the estate until the property is no longer property of the estate.[72] The stay remains in effect with respect to any other action until the case is closed or dismissed or the debtor is granted a discharge, whichever occurs first.[73] A creditor may seek relief from the stay for cause, including a lack of adequate protection of the creditor's interests.[74]

As discussed above, there are five different forms of bankruptcy relief, ranging from liquidation of a debtor's assets to reorganization of his debts. Each of these forms of relief offers protection, assistance, and opportunity for a "fresh start" for the debtor.

Chapter 7 is the most prevalent form of bankruptcy relief sought today. In a Chapter 7 case, the United States Trustee[75] appoints an interim trustee to serve as the representative of the estate until the meeting of creditors[76] is held. Creditors attending the meeting of creditors may elect their own trustee.[77] If they do not, the interim trustee serves as the trustee in the case.[78] The trustee is responsible for, among other things, collecting and liquidating the debtor's nonexempt assets.[79] In return for surrendering these nonexempt assets, the court will grant the debtor a discharge of his debts.[80] Yet, under certain circumstances, the bankruptcy court may deny the debtor a discharge[81] or find that a particular debt is nondischargeable.[82] If the

72. *Id.* § 362(c)(1). Property of the estate would cease to be property of the estate, for example, if it was claimed exempt, *see id.* § 522(b), if it was abandoned, *see id.* § 554, or if it was sold, *see id.* § 363(b).
73. *Id.* § 362(c)(2).
74. *See id.* § 362(d).
75. *See* 28 U.S.C. §§ 581-589a (1994). The United States Trustee System, which is part of the Department of Justice, was created to supervise the administration of bankruptcy cases. This is accomplished, in part, through the appointment and supervision of bankruptcy trustees.
76. *See* 11 U.S.C. § 341 (1994). The debtor is required to attend the meeting of creditors and submit to an examination under oath. *Id.* § 343. Creditors may attend and ask the debtor questions regarding her financial affairs. *Id.*
77. *Id.* § 702.
78. *Id.* § 702(d).
79. *Id.* § 704.
80. *See id.* § 727.
81. *See id.* § 727(a)(1)-(10). A debtor may be denied a discharge, for example, if he conceals property or records; knowingly and fraudulently gives a false oath or account; fails to explain a loss of assets; or refuses to obey a lawful order of the court. A complaint objecting to discharge must be filed within 60 days of the first date set for the meeting of creditors. FED. R. BANKR. P. 4004(a). The court may extend this deadline, but the motion for such an extension must be filed before the deadline passes. *Id.* 4004(b).
82. *See* 11 U.S.C. § 523(a)-(c) (1994). Section 523 lists 18 types of debts that are not discharged, including certain taxes; debts omitted from the debtor's schedules; debts for alimony, maintenance, or support; debts for certain student loans; and debts for death or personal injury that results from driving while intoxicated. A

debtor receives a discharge, she is not eligible to receive another Chapter 7 discharge for six years.[83]

Considered in the context of the history of bankruptcy discussed above, Chapter 9 is a relatively recent phenomenon, having its roots in the Municipal Bankruptcy Act,[84] which was a product of the Great Depression. Chapter 9 was relatively unused until the late 1980s when certain changes transformed municipal bankruptcy law into an effective way for a public entity to seek protection from its creditors while negotiating and formulating a plan of debt adjustment. Chapter 9 is largely patterned after the reorganization provisions of Chapter 11.[85] The mandate of the Tenth Amendment, however, limits the bankruptcy court's involvement in the administration of a Chapter 9 case or in the operation of the municipal entity, as compared to the court's involvement in cases filed under the other relief chapters.[86] As noted above, only a municipality[87] may seek Chapter 9 relief.[88] A Chapter 9 plan might include provisions to extend maturities, reduce interest or principal, or obtain a new loan from another source to pay off prefiling debts.[89]

Chapter 11 relief is available to individuals, partnerships, and corporations that wish to preserve, protect, and reorganize a financially distressed business. Reorganization under Chapter 11 allows a debtor to continue to operate its business while restructuring its prepetition debts by paying a portion of such debts and discharging the balance.

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complaint to determine the dischargeability of a debt must be brought within 60 days of the first date set for the meeting of creditors if the debt is incurred by false pretenses, false representations, actual fraud, or use of a false financial statement; a debt for fiduciary fraud or defalcation, embezzlement, or larceny; a debt for willful and malicious injury; or a debt incurred in connection with a divorce or separation for anything other than for alimony, maintenance, and support, *e.g.*, a property settlement. FED. R. BANKR. P. 4007(c). The court may also extend this deadline, but the motion for the extension must be filed before the deadline passes. *Id.* Other complaints to determine the dischargeability of debts may be brought at any time. *Id.* 4007(b).

83. 11 U.S.C. § 727(a)(8) (1994).

84. Municipal Bankruptcy Act, Pub. L. No. 251, 48 Stat. 798 (1934). The Municipal Bankruptcy Act was intended to amend an act known as "An Act to Establish a Uniform System of Bankruptcy Throughout the United States," as approved July 1, 1898. *Id.*

85. Many of the Bankruptcy Code provisions concerning Chapter 11 reorganizations, such as the content of the plan, classification of claims, acceptance of the plan, and confirmation of the plan, apply to Chapter 9 municipal reorganizations. 11 U.S.C. § 901(a) (1994). *See infra* notes 92-100 and accompanying text.

86. *See* H.R. REP. No. 95-595, at 263 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6221. For example, the court has no power to control expenditures for municipal services or any other activities of the municipal entity. 11 U.S.C. § 904 (1994).

87. Municipality is defined as a "political subdivision or public agency or instrumentality of a State." 11 U.S.C. § 101(40) (1994).

88. *Id.* § 109(c)(1).

89. 6 LAWRENCE KING, COLLIER ON BANKRUPTCY ¶ 900.01[1] (15th ed. rev. 1996).

Chapter 11 reorganization cases can be very complex and time-consuming, which makes Chapter 11 relief more expensive than the other forms of bankruptcy relief. In return for being permitted to remain in possession of its property and control of its business operation, a Chapter 11 debtor is considered a "debtor in possession" and must fulfill certain statutory duties of a trustee.[90] The bankruptcy court may, for cause, order the appointment of a trustee.[91] The court may also order that the case be converted to another chapter or be dismissed.[92]

During the first 120 days following the filing of a Chapter 11 petition, only the debtor may file a plan of reorganization.[93] A plan must include certain provisions and may include others, including "any other appropriate provision not inconsistent with the applicable provisions of [the Bankruptcy Code]."[94] Creditors are given the opportunity to accept or reject the plan based upon their reading of the plan and a court-approved "disclosure statement," which must accompany the plan.[95] The bankruptcy court must then determine whether the plan should be confirmed.[96] The plan may be modified either before or after confirmation.[97] An order confirming a Chapter 11 plan of reorganization binds all parties, including those creditors who rejected it, and discharges the debtor's remaining debt.[98]

A Chapter 12 reorganization is available only to a "family farmer"[99] and is designed to proceed on an expedited basis. The debtor who, like a Chapter 11 debtor, acts as a "debtor in possession,"[100] must file a plan within ninety days of the filing of his peti-

90. *See* 11 U.S.C. § 1107(a) (1994).
91. *Id.* § 1104(a)(1).
92. *Id.* § 1112.
93. *Id.* § 1121(b). If the debtor does not file a plan within the "exclusivity period," any party in interest may then file a plan. *See id.* § 1121(c)(2).
94. *Id.* § 1123(a), (b)(6).
95. *See id.* § 1125(b). The disclosure statement must include "information of a kind, and in sufficient detail . . . that would enable a hypothetical reasonable investor typical of holders of claims . . . to make an informed judgment about the plan." *Id.* § 1125(a)(1).
96. *See id.* § 1128. With one exception, the court may confirm a plan only if each of the requirements set forth in § 1129(a) is met. *See id.* § 1129(b)(1). If one or more classes of impaired claims does not accept the plan, the court may nevertheless confirm (or "cram down") the plan if it does not "discriminate unfairly and is fair and equitable" with respect to each such dissenting class. *Id.* What is "fair and equitable" is determined by § 1129(b)(2), the statutory embodiment of the "absolute priority rule."
97. *Id.* § 1127(a)-(b).
98. *Id.* § 1141(a), (d)(1)(A). This procedure differs from those in Chapters 12 and 13, in which the discharge is not granted until the debtor has completed her plan payments. *See id.* §§ 1228(a), 1328(a).
99. *Id.* § 109(f). *See generally id.* § 101(18) (defining "family farmer").
100. *Compare id.* § 1107(a) (setting forth the rights, powers, and duties of a debtor in possession under Chapter 11), *with id.* § 1203 (setting forth the rights and powers of a debtor under Chapter 12).

tion,[101] and the confirmation hearing must be concluded within forty-five days of the filing of the plan.[102] Thus, absent an extension, a debtor's plan should be confirmed within 135 days of the filing of the debtor's petition.

A Chapter 12 plan must provide that the debtor will submit future income to the supervision and control of the Chapter 12 trustee[103] to fund the plan; priority claims will be paid in full;[104] and each claim within a class of claims will receive the same treatment.[105] A Chapter 12 plan may include a number of other provisions, again including "any other appropriate provision not inconsistent with the applicable provisions of [the Bankruptcy Code]."[106] Such a plan "may not provide for payments over a period that is longer than three years, unless the court for cause approves a longer period, [up to] five years."[107]

While creditors do not vote on a Chapter 12 plan, they may object to its confirmation.[108] If the trustee or an unsecured creditor objects, the court may not confirm a Chapter 12 plan unless the unsecured creditors will be paid in full or the debtor offers all of her "disposable income"[109] to make payments under the plan for three years.[110] Unless the plan or the order confirming the plan provides otherwise, the debtor continues to operate the farm during the life of the plan,[111] and the trustee makes the payments to creditors under the plan.[112]

As is the case with respect to Chapter 11 plans, a Chapter 12 plan may be modified either before or after confirmation.[113] Upon completion of all plan payments, a Chapter 12 debtor is eligible for discharge.[114]

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101. *Id.* § 1221. The 90-day period may be extended "if the need for an extension is attributable to circumstances for which the debtor should not justly be held accountable." *Id.*

102. *Id.* § 1224. The 45-day period may be extended for cause. *Id.*

103. *Id.* § 1222(a)(1). *See generally id.* § 1202(b) (setting forth the duties of the trustee).

104. *Id.* § 1222(a)(2). *See generally id.* § 507 (setting forth the priority of expenses and claims).

105. *Id.* § 1222(a)(3).

106. *Id.* § 1222(b)(11).

107. *Id.* § 1222(c).

108. *See id.* § 1224.

109. *See generally id.* § 1225(b)(2) (defining "disposable income").

110. *Id.* § 1225(b)(1).

111. *See id.* § 1227(b).

112. *Id.* § 1226(c). For her services, the trustee receives a percentage fee, set by the Attorney General of the United States, which the trustee collects from the payments she receives from the debtor. *See* 28 U.S.C. § 586(e)(1)(B) (1994).

113. 11 U.S.C. §§ 1223, 1229.

114. *Id.* § 1228(a). If the debtor is unable to complete her plan payments "due to circumstances for which [she] should not justly be held accountable," the court may grant her a "hardship discharge." *Id.* § 1228(b).

While the eligibility requirements differ, Chapter 13 is very similar to Chapter 12. A Chapter 13 debtor, like a Chapter 12 debtor, proposes a plan[115] and makes payments to a trustee,[116] and the trustee[117] in turn makes payments to the debtor's creditors pursuant to that plan,[118] which may be modified either before or after confirmation.[119] Chapter 13 creditors also have much in common with their Chapter 12 counterparts, including the right to object to confirmation of the debtor's plan,[120] and the right to insist that the debtor either pay all unsecured claims in full or offer his "disposable income"[121] for the same three-year period provided for in Chapter 12.[122]

The two chapters are not identical, however. For example, a Chapter 13 reorganization lacks the same "fast track" as a Chapter 12 reorganization. While a Chapter 13 debtor has only fifteen days from the filing of his petition within which to timely file a plan,[123] Chapter 13 provides no specific time frame within which that plan must be confirmed. A Chapter 13 case may thus have a longer life than a Chapter 12 case. Another difference is that despite remaining in possession of the property of the estate, a Chapter 13 debtor has fewer duties imposed on her than a Chapter 11 or Chapter 12 debtor in possession.[124] A final example of the differences between the two chapters is that a Chapter 13 discharge is considerably broader in scope than a Chapter 12 discharge.[125]

Regardless of the chapter under which it is filed, a bankruptcy proceeding can be extremely complicated. The process requires a judge presiding over a bankruptcy case to balance the needs of the debtor against the competing and often conflicting interests of her creditors, using the statutory guidelines of the Bankruptcy Code as the fulcrum. To assist courts, debtors, creditors, and other interested parties in determining precisely what those needs and interests might be in a given case, the Federal Rules of Bankruptcy Procedure require debtors to make a full disclosure of a wide variety of information. "[T]he debtor . . . shall file schedules of assets and liabilities, a schedule of current income and expenditures, a schedule of executory contracts

115. *Id.* §§ 1321, 1322. *Cf. id.* § 1222.
116. *Id.* §§ 1326. *Cf. id.* § 1226.
117. *See generally id.* § 1302.
118. *Id.* § 1326(c). *Cf. id.* § 1226(c).
119. *Id.* §§ 1323, 1329. *Cf. id.* §§ 1223, 1229.
120. *See id.* § 1324.
121. *See id.* § 1325(b)(2).
122. *Id.* § 1325(b)(1). *Cf. id.* § 1225(b)(1).
123. *See* FED. R. BANKR. P. 3015(b).
124. *See* 11 U.S.C. §§ 1303–1304 (1994). *Cf. id.* §§ 1107, 1203.
125. *See id.* § 1328. *Cf. id.* § 1228. For example, certain taxes that are not dischargeable in Chapter 12 are dischargeable in Chapter 13. A Chapter 13 discharge is also broader in scope than a Chapter 7 or Chapter 11 discharge. *Cf. id.* §§ 727, 1141(d).

and unexpired leases, and a statement of financial affairs, prepared as prescribed by the appropriate Official Forms."[126] This information must be verified by the debtor to be true, accurate, and complete.[127]

In situations in which a debtor is suspected of a white-collar crime involving property of the estate, or in which the debtor's records could help establish a criminal case against him, the full disclosure requirements of the Bankruptcy Code and Rules may well be in direct conflict with the debtor's Fifth Amendment right to remain silent. In such a situation, the debtor may have to decide whether earning the bankruptcy discharge is more important than avoiding the possibility of being convicted of a crime. The scope of the privilege against self-incrimination is discussed below.

III. OVERVIEW OF THE FIFTH AMENDMENT

The United States Constitution initially did not include any prohibition against compelling a defendant to incriminate himself.[128] A mere four days after President Washington was inaugurated, however, Congressman James Madison of Virginia submitted such a proviso to the first House of Representatives as part of the Bill of Rights, in which Madison recommended the initial amendments to the Constitution.[129] Though Madison, as one of the anonymous coauthors of the Federalist Papers, originally resisted adding a Bill of Rights to the Constitution,[130] he eventually changed his mind. As he reassessed

126. FED. R. BANKR. P. 1007(b). *See also id.* 9009 (Forms); Official Form No. 6 (Schedules); Official Form No. 7 (Statement of Financial Affairs).

127. *See* FED. R. BANKR. P. 1008.

128. CATHERINE D. BOWEN, MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION, MAY TO SEPTEMBER, 1787 (1966); IRVING DILLIARD, BUILDING THE CONSTITUTION (50th anniv. ed. 1987)(reprinted from the St. Louis Post-Dispatch); CARL VAN DOREN, THE GREAT REHEARSAL: THE STORY OF THE MAKING AND RATIFYING OF THE CONSTITUTION OF THE UNITED STATES (1948); JAMES MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 REPORTED BY JAMES MADISON (Adrienne Koch ed., Ohio Univ. Press 1984)(1840); CLINTON ROSSITER, 1787: THE GRAND CONVENTION (1966).

129. RALPH KETCHAM, JAMES MADISON: A BIOGRAPHY 289 (1971). For further discussion of the legislative history of the Bill of Rights, see CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS (Helen E. Veit et al. eds., 1991)(tracing the political movement that led to the adoption of the first 10 amendments from its origins to its eventual success).

130. *See generally* VAN DOREN, THE FEDERALIST, OR THE NEW CONSTITUTION (Papers by Alexander Hamilton, James Madison, and John Jay)(1945). The *Federalist Papers* is a series of essays written after the Philadelphia Convention of 1787 to defend the proposed constitution and to explain in detail the meaning of various parts of the document. During the 1960s and 1970s, the late Herbert J. Storing compiled a collection of essays written in opposition to the Constitution during the ratification debate. THE COMPLETE ANTI-FEDERALIST, *supra* note 41. Professor Storing's work is an invaluable research tool for the legal historian interested in studying the many sides of the ratification debate.

his position, he came to believe that the republican system of government created by the Constitution would be better served if limits on the potent political power granted to the federal government were established and if checks on the strength of the majority were well-defined.[131] The United States Constitution was revised on December 15, 1791 to include ten of Madison's twelve proposed amendments, including the Self-incrimination Clause of the Fifth Amendment.

The privilege against self-incrimination "protects a witness from providing oral or written testimony that would furnish a link in the chain of evidence needed for criminal prosecution and attaches even if that risk is remote, for it is the possibility, rather than the likelihood, of prosecution that controls."[132] The privilege thus may be called into play in any situation involving "1) 'compelled' disclosure, 2) that is 'testimonial' and 3) 'incriminatory.'"[133] It "must be accorded liberal construction in favor of the right it was intended to secure."[134]

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131. *See* KETCHAM, *supra* note 129, at 289-90. Originally, Madison believed that a Bill of Rights was unnecessary because the limited grant of power to the government of the United States automatically ensured that the federal government could not violate the civil liberties of the people. In fact, Madison was concerned that any listing of rights that could not be violated by the government would lead to the negative inference that those not reserved could be denied. In part, Madison changed his mind due to his concern that the majority would abuse the power it wielded.

> [T]he prescriptions in favor of liberty ought to be levelled against that quarter where the greatest danger lies, namely, that which possesses the highest prerogative of power. But this is not found in either the Executive or Legislative departments of Government, but in the body of the people, operating by the majority against the minority. It may be thought that all paper barriers against the power of the community are too weak to be worthy of attention; . . . yet as they have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community, it may be one means to control the majority from those acts to which they might otherwise be inclined.

Id. at 290. *See also* ROBERT RUTLAND, JAMES MADISON: THE FOUNDING FATHER 59-69 (1987)(discussing Madison's role as advocate for the Bill of Rights).

132. *In re* ICS Cybernetics, Inc., 107 B.R. 821, 827 (Bankr. E.D.N.Y. 1989)(citing United States v. Edgerton, 734 F.2d 913, 921 (2d Cir. 1984)); Marine Midland Bank, N.A. v. Endres (*In re* Endres), 103 B.R. 49 (Bankr. N.D.N.Y. 1989)(citing Pillsbury v. Conboy, 459 U.S. 248, 265 n.1 (1983)(Marshall, J., concurring)); Hoffman v. United States, 341 U.S. 479, 486 (1951)); Moll v. U.S. Life Title Ins. Co., 113 F.R.D. 625 (S.D.N.Y. 1987).

133. Fisher v. United States, 425 U.S. 391 (1976); *In re* ICS Cybernetics, Inc., 107 B.R. 821, 827 (Bankr. E.D.N.Y. 1989)(citing Two Grand Jury Contemnors v. United States (*In re* Grand Jury Subpoena), 826 F.2d 1166, 1168 (2d Cir. 1987)); Rivoli Grain Co. v. Litton (*In re* Litton), 74 B.R. 557, 559 (Bankr. C.D. Ill. 1987)(citing *In re* Connelly, 59 B.R. 421, 431 (Bankr. N.D. Ill. 1986)).

134. Hoffman v. United States, 341 U.S. 479, 486 (1951).

A disclosure is "compelled" whenever "physical or moral compulsion" is used against the individual asserting the privilege.[135] Such compulsion is present in the various discovery tools made available in bankruptcy proceedings because a party can be compelled to provide, and sanctioned for failure to provide, discovery information.[136] Such compulsion also is present in (1) meetings of creditors, because the debtor is required to "appear and submit to examination under oath,"[137] and (2) in examinations ordered by the court, because the party to be examined may be compelled by the court to attend, to submit to examination, and to produce documentary evidence.[138] On the other hand, such compulsion is absent with respect to "records required to be maintained by law and the contents of those voluntarily prepared and regularly kept in the course of business."[139] Thus, such documents are left unprotected by the privilege.

To be considered "testimonial," a "communication must itself, explicitly or implicitly, relate a factual assertion or disclose information" that conveys "the contents of an individual's mind."[140] A physical act can constitute testimony if it "probe[s] the state of mind, memory, perception, or cognition of the witness."[141] For example, while one ordinarily might not consider the act of producing documents testimonial, such an act can be testimonial if it takes on testimonial and incriminating attributes, such as verifying the existence of the documents or the accuracy of their contents.[142]

Testimony is "incriminatory" when it "might or tends to incriminate."[143] The threat of incrimination must be real. "[T]he claimant

135. *In re* ICS Cybernetics, Inc., 107 B.R. 821, 827 (Bankr. E.D.N.Y. 1989)(quoting Fisher v. United States, 425 U.S. 391, 397 (1976); Doe v. United States, 860 F.2d 40, 46 (2d Cir. 1988)(quoting Holt v. United States, 218 U.S. 245, 252-53 (1911))).

136. *See* FED. R. BANKR. P. 7030 (depositions upon oral examination), 7031 (depositions upon written request), 7033 (interrogatories), 7034 (production of documents and things and entry upon land for inspection and other purposes), 7035 (physical and mental examination of persons), 7036 (requests for admission), 7037 (sanctions).

137. 11 U.S.C. §§ 341, 343 (1994).

138. *See* FED. R. BANKR. P. 2004.

139. *In re* ICS Cybernetics, Inc., 107 B.R. 821, 827 (Bankr. N.D.N.Y. 1989)(citing United States v. Doe, 465 U.S. 605, 610-12 & n.10 (1984)); *In re* Sealed Case, 877 F.2d 83, 87-88 (D.C. Cir. 1989); *In re* Two Grand Jury Subpoenae Duces Tecum, 793 F.2d 69, 73 (2d Cir. 1986); United States v. North, 708 F. Supp. 402, 404 (D.D.C. 1989); *In re* Mudd, 95 B.R. 426, 431-32 (Bankr. N.D. Tex. 1989); *In re* Connelly, 59 B.R. 421, 440-41 (Bankr. N.D. Ill. 1986)(citing Shapiro v. United States, 335 U.S. 1, 33 (1948)).

140. Doe v. United States, 487 U.S. 201, 210 n.9 (1988).

141. Braswell v. United States, 487 U.S. 99, 126 (1988)(Kennedy, J., dissenting).

142. *Compare* United States v. Doe, 465 U.S. 605, 612-14 (1984)(protecting the act of producing papers), *with* Fisher v. United States, 425 U.S. 391, 411 (1976)(production of papers not protected when existence and location is not at issue).

143. *See* Torcie v. Ruff (*In re* Growers Packing Co., Inc.), 150 B.R. 82, 83 (Bankr. S.D. Fla. 1993)(citing Hoffman v. United States, 341 U.S. 479, 486 (1951); Emspak v.

must be 'confronted by substantial and real,' and not merely trifling or imaginary, hazards of incrimination."[144] Put another way, "[t]he privilege protects against disclosure when a witness has a reasonable apprehension, not merely an imaginary possibility, of disclosing incriminating testimony."[145] However, "[i]nformation is protected by the privilege not only if it would support a criminal conviction, but even if 'the responses would merely "provide a lead or clue" to evidence having a tendency to incriminate.'"[146] The question of whether the individual actually will be prosecuted is not an issue. "It is not a court's role to speculate whether or not the witness will be prosecuted once the determination has been made that the answers sought would tend to incriminate."[147]

The Fifth Amendment privilege serves to protect individuals from being compelled to testify about matters that potentially could subject them to criminal liability. Under appropriate circumstances, however, the privilege may also extend to some corporate matters.

IV. CORPORATIONS

A corporation is considered a "person" for many purposes, including determining who is eligible to file a Chapter 7 or Chapter 11 petition.[148] Yet, "[a] corporation is not a 'person' entitled to claim the Fifth Amendment's privilege against self-incrimination."[149] Only an individual may assert a claim of privilege against self-incrimination. "[F]or purposes of the Fifth Amendment, corporations and other collective entities are treated differently from individuals . . . [in that] a corporation has no Fifth Amendment privilege."[150] As a result, "a cor-

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United States, 349 U.S. 190, 197 (1955); Minnesota v. Murphy, 465 U.S. 420, 426 (1984)).

144. United States v. Paris, 827 F.2d 395, 398 (9th Cir. 1987)(quoting United States v. Apfelbaum, 445 U.S. 115, 128 (1980)).

145. Torcie v. Ruff (*In re* Growers Packing Co., Inc.), 150 B.R. 82, 83 (Bankr. S.D. Fla. 1993)(citing Hoffman v. United States, 341 U.S. 479, 486 (1951)(reasonable apprehension); Rogers v. United States, 340 U.S. 367, 375 (1951)(imaginary possibility)).

146. *In re* Ross, 156 B.R. 272, 275 (Bankr. D. Idaho 1993)(quoting United States v. Neff, 615 F.2d 1235, 1239 (9th Cir. 1980)).

147. *In re* ICS Cybernetics, Inc., 107 B.R. 821, 827 (Bankr. N.D.N.Y. 1989)(citing United States v. Edgerton, 734 F.2d 913, 921 (2d Cir. 1984)).

148. *See, e.g.*, 11 U.S.C. §§ 101(41) (1994)("'person' includes individual, partnership, and corporation"); *id.* § 109(b) ("[a] person may be a debtor under chapter 7 of this title"); *id.* § 109(d) ("Only a person that may be a debtor under chapter 7 of this title . . . may be a debtor under chapter 11 of this title."). *Cf.* 11 U.S.C. § 109(e) (1994)("Only an individual . . . may be a debtor under chapter 13 of this title.").

149. *In re* Marine Power & Equip. Co., 67 B.R. 643, 649 (Bankr. W.D. Wash. 1986).

150. Braswell v. United States, 487 U.S. 99, 104 (1988)(citing Hale v. Henkel, 201 U.S. 43 (1906)). *See also In re* Toyota of Morristown, Inc., 120 B.R. 925, 927 (Bankr. E.D. Tenn. 1990)("It is well settled that corporations and various other collective entities are not entitled to assert any fifth amendment privilege since such a priv-

porate officer cannot refuse to testify or produce corporate documents on the grounds that he may thereby incriminate the corporation."[151]

Moreover, "a representative of a corporation '[cannot] resist [a] subpoena for corporate documents on the ground that the act of production might tend to incriminate *him*.'"[152] As the Supreme Court noted in *Braswell v. United States*,[153]

> the Court has consistently recognized that the custodian of corporate or entity records holds those documents in a representative rather than a personal capacity. Artificial corporations may act only through their agents . . . and a custodian's assumption of his representative capacity leads to certain obligations, including the duty to produce corporate records on proper demand by the Government. Under those circumstances, the custodian's act of production is not deemed a personal act, but rather an act of the corporation. Any claim of Fifth Amendment privilege asserted by the agent would be tantamount to a claim of privilege by the corporation—which of course possesses no such privilege.[154]

Under the circumstances, "[t]he fact that the production of such books and records might tend to incriminate one acting in a representative capacity personally is immaterial."[155]

This is not to say that a corporate officer may never assert the Fifth Amendment. "There is a distinction between individuals acting as corporate officers and individuals in their *personal* capacity; in their

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ilege is available only to natural individuals.")(citing Braswell v. United States, 487 U.S. 99 (1988); United States v. Doe, 465 U.S. 605 (1984); Fisher v. United States, 425 U.S. 391 (1976); Bellis v. United States, 417 U.S. 85 (1974); United States v. White, 322 U.S. 694 (1944); Wilson v. United States, 221 U.S. 361 (1911)).

151. *In re* Marine Power & Equip. Co., 67 B.R. 643, 649 (Bankr. W.D. Wash 1986)(citing Curio v. United States, 354 U.S. 118 (1957); Baltimore & Ohio R.R. Co. v. Interstate Commerce Comm'n, 221 U.S. 612 (1911); Hale v. Henkel, 201 U.S. 43 (1906); 9A W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 4671 (rev. perm. ed. 1985)). *See also In re* Toyota of Morristown, Inc., 120 B.R. 925, 927 (Bankr. E.D. Tenn. 1990)("It is also settled that when the business records of a corporation are subpoenaed from the corporation or from the custodian of records of the corporation, the officers or the custodian of records of the corporation, in their representative capacity, cannot withhold production on fifth amendment grounds.")(citing Braswell v. United States, 487 U.S. 99 (1988); *In re* Grand Jury Proceedings (Morganstern), 771 F.2d 145 (6th Cir. 1985)).

152. *In re* Caucus Distribs., Inc., 106 B.R. 890, 896 (Bankr. E.D. Va. 1989)(alteration in original)(quoting Braswell v. United States, 487 U.S. 99 (1988)). *See also In re* Toyota of Morristown, Inc., 120 B.R. 925, 927 (Bankr. E.D. Tenn. 1990)(stating that an officer or custodian of records of a corporation may not withhold production of business records "even if the production of the records would personally incriminate the officer or custodian")(citing Braswell v. United States, 487 U.S. 99 (1988); Bellis v. United States, 417 U.S. 85 (1974); United States v. White, 322 U.S. 694 (1944); Wilson v. United States, 221 U.S. 361 (1911); *In re* Grand Jury Proceedings (Morganstein), 771 F.2d 145, 148 (6th Cir. 1985)).

153. 487 U.S. 99 (1988).

154. *Id.* at 109-10.

155. *In re* Einhorn, 33 B.R. 665, 667 (Bankr. E.D.N.Y. 1983)(citing United States v. White, 322 U.S. 694 (1944)).

personal capacity they may be entitled to invoke the privilege against self-incrimination."[156] Upon being served with discovery requests, however, a corporation is "*obliged* to appoint agents who can, without fear of self-incrimination, furnish such requested information as is available" to the corporation.[157]

> "It would indeed be incongruous to permit a corporation to select an individual to verify the corporation's answers, who because *he* fears self-incrimination may thus secure for the corporation the benefits of a privilege it does not have." Such a result would effectively permit the corporation to assert on its own behalf the personal privilege of its individual agents.[158]

It is much easier for a *former* corporate officer or agent to invoke the privilege against self-incrimination. For example, in *In re Toyota of Morristown, Inc.*,[159] the plaintiffs in an adversary proceeding caused a subpoena duces tecum to be served on the debtor's former general manager. The subpoena sought the production of, among other things, a box of telecopies that the former general manager allegedly took with him when he left the debtor's employ. In quashing the subpoena, the court noted that

> Coleman [the former general manager] is neither an officer, agent, nor custodian of records of Toyota of Morristown, Inc. Any act of producing corporate records, whether the records are extra copies of records furnished to Coleman or original records illicitly obtained by Coleman upon his departure from the company, would be an act by Coleman, not in a representative capacity, but in his personal capacity. Such an act, if incriminating, could be used by the government as evidence of a personal act or admission by Coleman.[160]

The same result was reached under similar circumstances in *In re Grand Jury Subpoenas Duces Tecum*.[161] In that case, a grand jury issued and caused to be served on a former officer of a corporation a subpoena duces tecum, which sought the production of various corporate records that the former officer was alleged to have misappropriated when he left the company. While acknowledging the rule that a corporate officer cannot assert a Fifth Amendment privilege with respect to corporate documents in his possession, the court nevertheless reversed the district court's order enforcing the subpoena, stating that

> [o]nce the officer leaves the company's employ . . . he no longer acts as a corporate representative but functions in an individual capacity in his possession of corporate records. Although his possession of them as a private citizen may have been derived from his wrongful misappropriation of them from the corporation, we do not view such conduct as depriving him, once the documents are in his possession (rather than as a corporate representative), of his right

156. *In re* Marine Power & Equip. Co., 67 B.R. 643, 649 (W.D. Wash. 1986)(citing Curcio v. United States, 354 U.S. 118 (1957)).
157. Slon-Stiver v. Kossoff (*In re* Tower Metal Alloy Co.), 188 B.R. 954, 957 (Bankr. S.D. Ohio 1995)(citing United States v. Kordel, 397 U.S. 1, 8 (1970)).
158. *Id.* (citations ommitted).
159. 120 B.R. 925 (Bankr. E.D. Tenn. 1990).
160. *Id.* at 929.
161. 722 F.2d 981 (2d Cir. 1983).

> under the Fifth Amendment to invoke the act of production doctrine outlined in *Fisher* [*v. United States*, 425 U.S. 391 (1976)].[162]

The *Grand Jury Subpoenas Duces Tecum* decision was followed in *In re ICS Cybernetics, Inc.*,[163] in which the court was asked to compel a debtor's former president to turn over the contents of three boxes of records that he had brought with him to a Rule 2004 examination pursuant to a subpoena, but refused to surrender. Because "the subpoena was issued some four months after Allen [the former president] ceased to be the Debtor's president and was directed at him personally, and not at the Debtor—who would then presumably have been obligated to designate an agent to produce the requested records," the court upheld the former president's claim of privilege.[164]

> No longer the Debtor's officer, Allen only possesses the corporate records in a personal capacity and is fully able to shield himself under the act of production doctrine. Thus, in certain situations where there is no agency, such as those involving an ex-employee, an individual's Fifth Amendment rights can provide a limited exception to the non-privileged act of producing corporate documents, undercutting the collective entity rule.[165]

As the foregoing discussion suggests, the privilege against self-incrimination applies not only with respect to oral testimony, but also with respect to written testimony, i.e., documents. The extent to which the Fifth Amendment protects against the compelled production of documents is discussed in detail below.

V. DOCUMENTS

Documents may be incriminating in two ways. First, and perhaps more obviously, the contents of documents may be incriminating. Nevertheless, the simple act of producing documents also may be incriminating.[166]

The privilege against self-incrimination was first extended to the contents of documents by the United States Supreme Court in *Boyd v. United States*.[167] The continued validity of *Boyd* has been called into question by a number of subsequent Supreme Court decisions, however. For example, in *Fisher v. United States*,[168] the Supreme Court

162. *Id.* at 986-87 (citation omitted).
163. 107 B.R. 821 (Bankr. N.D.N.Y. 1989). *But see In re* Stoecker, 103 B.R. 182, 187 n.1 (Bankr. N.D. Ill. 1989)(noting that the Seventh Circuit had not adopted the *In re* Grand Jury Subpoenas Duces Tecum "extension of *Fisher*").
164. *In re* ICS Cybernetics, Inc., 107 B.R. 821, 830 (Bankr. N.D.N.Y. 1989).
165. *Id.* (citing SEC v. First Jersey Sec., Inc., 843 F.2d 74, 77 (2d Cir. 1988); *In re* Grand Jury Subpoenae Duces Tecum, 769 F.2d 52 (2d Cir. 1985); Pacific Mut. Life Ins. Co. v. American Nat'l Bank, 649 F. Supp. 281, 287 (N.D. Ill. 1986); *In re* Fed. Deposit Ins. Corp., 640 F. Supp. 1178, 1178 (S.D.N.Y. 1986)).
166. Butcher v. Bailey, 753 F.2d 465, 469 (6th Cir. 1985)(citing United States v. Doe, 465 U.S. 605, 613 n.11 (1984)).
167. 116 U.S. 616 (1886).
168. 425 U.S. 391 (1976).

refused to extend the privilege to the contents of an accountant's work papers. Similarly, in *United States v. Doe*,[169] the Supreme Court refused to extend the privilege to the contents of a sole proprietor's business records. In her concurring opinion in *Doe*, Justice O'Connor even went so far as to say that she was writing "to make explicit what is implicit in the [Supreme Court's] analysis of . . . [*Boyd*]: that the Fifth Amendment provides absolutely no protection for the contents of private papers of any kind."[170]

While these decisions would appear to "all but eliminate any privilege based on the contents of incriminating documents,"[171] the possibility still exists that the privilege might extend to the contents of private papers in those rare situations involving a significant invasion of privacy. Notwithstanding the unequivocal statement in *Fisher* that "the Fifth Amendment protects against 'compelled self-incrimination, not [the disclosure of] private information,'"[172] at least one court has considered extending the privilege under such circumstances.

In *Butcher v. Bailey*,[173] the bankruptcy court upheld the debtor's assertion of the privilege against self-incrimination with respect to certain personal records that related to property of the bankruptcy estate.[174] On appeal, the Sixth Circuit Court of Appeals provided the following analysis:

> Although we do not read either [*Fisher* or *Doe*] as holding that the contents of private papers are *never* privileged, it is evident from the dialogue between Justice Marshall and Justice O'Connor, in their concurring opinions in *Doe* . . . that if contents are protected at all, it is only in rare situations, where compelled disclosure would break "the heart of our sense of privacy."[175]

Unfortunately for the debtor in *Butcher*, the court was not persuaded that the disclosure of the records in that case was sufficiently invasive of the debtor's privacy interests to warrant extending the privilege to prevent their disclosure. As a result, the court reversed the bankruptcy court's decision.

> The records . . . are personal records, but only those personal records which relate to property of the bankrupt's estate. Information relating to property of the estate is not so intimately personal as to evoke serious concern over privacy interests, particularly in bankruptcy where the trustee has a strong interest in knowing the nature and scope of the estate's holdings.[176]

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169. 465 U.S. 605 (1984).

170. *Id.* at 618 (O'Connor, J., concurring).

171. *In re* Toyota of Morristown, Inc., 120 B.R. 925, 929 (Bankr. E.D. Tenn. 1990).

172. Fisher v. United States, 425 U.S. 391, 401 (1976)(citing United States v. Nobles, 422 U.S. 225, 233 n.7 (1975)).

173. 753 F.2d 465 (6th Cir. 1985).

174. *See* 11 U.S.C. § 541 (1994).

175. Butcher v. Bailey, 753 F.2d 465, 469 (6th Cir. 1985)(citations ommitted).

176. *Id.*

Thus, even private papers are not considered privileged unless the production of them is somehow testimonial and they involve extremely private matters.[177]

While the content of documents may no longer be privileged, "[t]he act of producing . . . documents . . . may be privileged if such production is compelled, testimonial, and incriminating."[178] Determining whether the production of a given document is privileged "may . . . depend on the facts and circumstances of particular cases or classes thereof."[179]

The element of compulsion has been found to be missing in a number of older Supreme Court cases involving the records of a debtor in bankruptcy. For example, in *In re Harris*,[180] the Supreme Court held that a debtor could not assert the privilege against self-incrimination to avoid turning his books and records over to an interim receiver. Writing for a unanimous Court, Justice Holmes concluded that

> no constitutional rights are touched. The question is not of testimony but of surrender—not of compelling the bankrupt to be a witness against himself in a criminal case, present or future, but of compelling him to yield possession of property that he is no longer entitled to keep. If a trustee had been appointed, the title to the books would have vested in him by the express terms of Section 70 [of the Bankruptcy Act of 1898], and the bankrupt could not have withheld possession of what he no longer owned, on the ground that otherwise he might be punished. That is one of the misfortunes of bankruptcy if it follows crime. The right not to be compelled to be a witness against oneself is not a right to appropriate property that may tell one's story.[181]

Harris appears to remain good law, having been relied upon by the Supreme Court in more recent cases, such as *Fisher v. United States*.[182]

The Sixth Circuit Court of Appeals, however, does not share this interpretation of the precedential value that should be afforded *Harris*.

> At the time *Harris* was decided . . . the Court had not yet come around to the view that the act of production itself could be testimonial. That view, implicit in the later cases of *Dier*, *Johnson*, and *Fuller*, has more recently been expressly recognized . . . . Because *Harris* is inconsistent with this subsequent development, we believe that it is no longer controlling.[183]

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177. *In re* Tower Metal Alloy Co., 200 B.R. 598, 606 (Bankr. S.D. Ohio 1996)(citing Butcher v. Bailey, 753 F.2d 465, 469 (6th Cir. 1985)).

178. *In re* Toyota of Morristown, Inc., 120 B.R. 925, 929 (Bankr. E.D. Tenn. 1990)(citing United States v. Doe, 465 U.S. 605 (1984); Butcher v. Bailey, 753 F.2d 465 (6th Cir. 1985)).

179. Fisher v. United States, 425 U.S. 391, 410 (1976).

180. 221 U.S. 274 (1911).

181. *Id.* at 279-80. *See also* Dier v. Banton, 262 U.S. 147, 149-50 (1923); *In re* Fuller, 262 U.S. 91, 93-94 (1923); Johnson v. United States, 228 U.S. 457, 458-59 (1913).

182. 425 U.S. 391 (1976).

183. Butcher v. Bailey, 753 F.2d 465, 468 (6th Cir. 1985).

Only time—and the United States Supreme Court—will determine the extent to which *Harris* remains good law.

The element of compulsion also has been discounted—or, perhaps more accurately, disregarded—in at least three other situations that have bankruptcy implications. First, it is "well-settled law that a public official has no Fifth Amendment right to withhold public records from grand jury review even if the records tend to incriminate the official in a specific crime."[184] In discussing this "public records" exception, the Supreme Court has noted that

> in the case of public records and official documents, made or kept in the administration of public office, the fact of actual possession or of lawful custody would not justify the officer in resisting inspection, even though the record was made by himself and would supply the evidence of his criminal dereliction. If he has embezzled the public moneys and falsified the public accounts, he cannot seal his official records and withhold them from the prosecuting authorities on a plea of constitutional privilege against self-incrimination.[185]

To illustrate this principle, the Supreme Court cited cases refusing to extend the privilege to a "vestry clerk,"[186] a "state dispenser,"[187] and a "druggist,"[188] each of whom was required by law to maintain certain records. The Supreme Court summarized various courts' reasoning as follows:

> The fundamental ground of decision in this class of cases, is that where, by virtue of their character and the rules of law applicable to them, the books and papers are held subject to examination by the demanding authority, the custodian has no privilege to refuse production although their contents tend to criminate him. In assuming their custody he has accepted the incident obligation to permit inspection.[189]

The public records exception has been applied in the context of a motion to remove a Chapter 7 trustee.[190] In *In re Grand Jury Proceedings*,[191] the bankruptcy court denied a Chapter 7 trustee's assertion of the privilege against self-incrimination and ordered him to turn over to the United States Trustee all documents pertaining to his administration of a Chapter 7 case in which he had resigned in response to the United States Trustee's motion to remove him. On appeal, the district court first found that the trustee "in his official capacity as Chapter 7 trustee" was "an 'officer of the court.'"[192] The court then concluded that "all of the records relating to [the trustee's]

184. *In re* Grand Jury Proceedings, 119 B.R. 945, 949 (E.D. Mich. 1990).
185. Wilson v. United States, 221 U.S. 361, 380 (1911).
186. *Id.* at 380 (citing Bradshaw v. Murphy, 7 Car. & P. 612, 173 Eng. Rep. 269 (1836)).
187. *Id.* at 380-81 (citing State v. Farnum, 53 S.E. 83 (1905)).
188. *Id.* at 381 (citing State v. Donovan, 86 N.W. 709 (1901); State v. Davis, 18 S.W. 894 (1892)).
189. *Id.* at 381-82.
190. *See* 11 U.S.C. § 324 (1994).
191. 119 B.R. 945 (E.D. Mich. 1990).
192. *Id.* at 949.

administration of the bankruptcy estate are subject to compelled disclosure . . . notwithstanding the Fifth Amendment."[193]

> [T]he position of Chapter 7 Trustee is a public office, well within the class of cases discussed . . . by the Supreme Court in *Wilson [v. United States*, 221 U.S. 361 (1911)]. First, [the trustee] was appointed by the Bankruptcy Court to that position and served in that capacity under supervision of the Bankruptcy Court. Second, . . . the position of bankruptcy trustee is deemed by Congress to be an "officer of the court." Third, in voluntarily undertaking the position of trustee, [the trustee] took on the explicit duties set out in Section 704 of the Bankruptcy Code, including the duty to maintain records, and the duty to make an accounting.[194]

While the debtor in possession in a Chapter 11 or 12 case is not an officer of the court, such a debtor is subject to the supervision of the court and has many of the duties of a trustee, including specifically the duty to maintain records and the duty to make an accounting.[195] That being so, compelling the production of such a debtor's postpetition books and records would seem to be a logical extension of the public records exception.[196]

Under certain circumstances, the private records of a private individual may be entitled to no greater protection than public records: "an individual can, notwithstanding the Fifth Amendment, be compelled to produce private records if the requested records fall within the 'required records' exception to the Fifth Amendment."[197] This second situation in which the element of compulsion has been discounted arises when the following circumstances exist: "First, the purposes of the government's inquiry must be essentially regulatory, rather than criminal. Second, the records must contain the type of information that the regulated party would ordinarily keep. Third, the records 'must have assumed "public aspects" which render them at least analogous to public documents.'"[198] Several bankruptcy courts have applied this rule (the "*Underhill* test") in requiring individuals to turn over their books and records.

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193. *Id.* at 950.

194. *Id.* (citations omitted).

195. *See* 11 U.S.C. §§ 704, 1106-1107, 1203 (1994). The duties of a Chapter 13 debtor are not coextensive with the duties of a trustee. A Chapter 13 debtor engaged in business is required only to file the periodic operating reports described in § 704(8). *Id.* § 1304(c).

196. *See In re* Grand Jury Proceedings, 119 B.R. 945, 949-50 n.4 (E.D. Mich. 1990).

197. *Id.* at 948 (citing *In re* Grand Jury Subpoena Duces Tecum Served Upon Underhill, 781 F.2d 64, 67 (6th Cir. 1986)). At least one court has commented that the required records exception "amounts to a waiver of any Fifth Amendment claim." *In re* ICS Cybernetics, Inc., 107 B.R. 821, 827 (Bankr. N.D.N.Y. 1989).

198. *In re* Grand Jury Subpoena Duces Tecum Served Upon Underhill, 781 F.2d 64, 67 (6th Cir. 1986)(citing Grosso v. United States, 390 U.S. 62, 67-68 (1968)(interpreting Shapiro v. United States, 335 U.S. 1 (1948))).

For example, in *Matter of Jim's Garage*,[199] the bankruptcy court applied the *Underhill* test in ruling that a Chapter 7 trustee had to comply with a court order directing him to turn over to the United States Trustee all records pertaining to his administration of a Chapter 7 estate. With respect to the first element of this test, the court drew the following conclusion:

> [I]t can [not] be reasonably argued that the provisions of the Bankruptcy Code which directly or indirectly mandate the keeping of the records sought can be said to serve *only* criminal prosecution purposes. Nor can it be argued that such provisions do not have as their primary purpose the proper administration of bankruptcy estates and the enablement of those charged with the oversight and supervision of bankruptcy trustees, to perform their statutory duties, in connection therewith.[200]

With respect to the second element, the court found that

> [a] trustee cannot comply with the mandate that he "keep a record of receipts and the disposition of money and property received" and "file the reports and summaries required", unless he keeps the records sought in this case. The filing of reports mandated by various sections of the statutes and rules, necessarily implies the maintenance of underlying records necessary for the preparation of those reports. It cannot be reasonably argued that such records would not be ordinarily kept by a case trustee.[201]

Finally, with respect to the third element, the court found that

> [t]he periodic reports which a trustee is required to "file", are by virtue of those filings, public records in any sense of that term. Should there be a question or issue as to the "account" of a trustee (accounts which themselves are specifically or in effect allowed by the court after a hearing or an opportunity for one) a party in interest would be entitled or be given the opportunity to inspect the underlying records which afford the basis for such accountings.[202]

A bankruptcy court's application of this test in other cases has potentially wide-ranging consequences. As noted above, a Chapter 11 or 12 debtor in possession has the same duty as a trustee to maintain records, file periodic reports, and make a final accounting.[203] A court applying the *Underhill* test could therefore logically conclude that the privilege against self-incrimination does not extend to such a debtor's postpetition books and records.

The third situation in which the element of compulsion has been discounted is exemplified by the Supreme Court's decision in *Baltimore City Department of Social Services v. Bouknight*.[204] In that case,

199. 118 B.R. 949 (Bankr. E.D. Mich. 1989), *aff'd on other grounds sub nom.*, *In re* Grand Jury Proceedings, 119 B.R. 945 (E.D. Mich. 1990).

200. *Id.* at 951.

201. *Id.* at 952-53.

202. *Id.* at 953.

203. *See* 11 U.S.C. § 704 (1994), *amended by* 98 Stat. 381, 98 Stat. 355, 100 Stat. 3100; *id.* § 1106 (1994), *amended by* 98 Stat. 355, 100 Stat. 3114, 98 Stat. 384; *id.* § 1107 (1994), *amended by* 98 Stat. 384, 1203, *repealed by* 100 Stat. 3121. A Chapter 13 debtor engaged in business, on the other hand, has only the duty to file periodic reports. *See id.* § 1304(c), *amended by* 98 Stat. 355.

204. 493 U.S. 549 (1990).

a mother suspected of abusing her child was permitted to retain custody, but only under conditions imposed by the juvenile court. When the Department of Social Services later sought and obtained an order to place the child in foster care, the mother refused to produce the child and was held in contempt. The mother then challenged the contempt order on the ground that it violated her Fifth Amendment privilege. In denying the mother's challenge, the Court held that

> [t]he possibility that a production order will compel testimonial assertions that may prove incriminating does not, in all contexts, justify invoking the privilege to resist production . . . . Even assuming that this limited testimonial assertion is sufficiently incriminating and "sufficiently testimonial for purposes of the privilege," Bouknight [the mother] may not invoke the privilege to resist the production order because she has assumed custodial duties related to production and because production is required as part of a noncriminal regulatory regime.[205]

In recognizing that the Fifth Amendment does not in every situation prohibit compelling the production of incriminating evidence, the Supreme Court appears to have applied a balancing test of sorts, with the individual's interest in not producing the evidence on one side of the scale, and the government's interest in maintaining its noncriminal regulatory regimes on the other.[206]

The Supreme Court's reasoning would seem to apply with respect to a debtor's books and records.

> 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. That is essentially what the Supreme Court did in [*Bouknight*] . . . .
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> . . . .
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> It cannot be said that the Bankruptcy Code provides a regulatory or investigative regime designed to ferret out prospective criminal defendants. . . . On the other hand, it can be said that liquidation of business cases under Chapter 7 of the Code would be severely hampered, if not rendered impossible, were the bankruptcy debtor able to withhold from the trustee the books and records of the business on grounds of possible incriminatory effects as to certain of those records.[207]

A debtor who files a voluntary bankruptcy assumes the responsibility of producing records that relate to her prepetition financial affairs. A Chapter 11 or 12 debtor assumes the additional fiduciary responsibilities of a debtor in possession and must account for the administration of the estate to his creditors and the court. In cases in which the debtor is asked to produce documents that relate to these matters, the protection afforded by the Fifth Amendment seems to be lessened by

205. *Id.* at 555-56 (citation omitted).
206. *See In re* Fairbanks, 135 B.R. 717, 730-31, 733 (Bankr. D.N.H. 1991).
207. *Id.* at 730-31, 733.

the *Bouknight* rationale because this information is required as part of a noncriminal regulatory process.

This was the holding in *In re Ross*,[208] in which the bankruptcy court cited both *Bouknight* and *Fairbanks* in support of the proposition that "even if the act of production involved here was both testimonial and incriminating, the nature of Chapter 7 as a regulatory regime directed toward society as a whole, and not toward inherently suspect criminal classes, renders the act of production outside the protection of the Fifth Amendment."[209] This line of cases suggests that some wayward debtors and trustees may have a difficult time relying upon the Fifth Amendment as a means of keeping records they are required to maintain out of the hands of creditors and other interested parties who wish to see them.

Assuming the element of compulsion is shown, an individual must also demonstrate that the act of producing the requested documents is "testimonial" to avoid the production of documents on Fifth Amendment grounds.[210] Such an act "may be testimonial in any of three ways: by acknowledging that the documents exist; by acknowledging that they are in the control of the person producing them; or by acknowledging that the person producing them believes they are the documents requested and thereby authenticating them for purposes of Fed.R.Evid. 901."[211] The act of producing documents, however, "is not considered testimonial if each of these considerations is a 'foregone conclusion.'"[212]

For example, in *Fisher v. United States*,[213] the Supreme Court held that a taxpayer's turning over his accountant's work papers was not testimonial because the existence and location of the work papers were known, and the taxpayer's production of them would not be sufficient authentication to permit their introduction as evidence. In *United States v. Doe*,[214] however, the Court held that an individual's turning over his business records was testimonial because the existence and location of the records were not known, and the individual's

208. 156 B.R. 272 (Bankr. D. Idaho 1993).

209. *Id.* at 281.

210. *See In re* Toyota of Morristown, Inc., 120 B.R. 925, 929 (Bankr. E.D. Tenn. 1990)(citing United States v. Doe, 465 U.S. 605, 612-14 (1984); Fisher v. United States, 425 U.S. 391, 410-11 (1976); Butcher v. Bailey, 753 F.2d 465, 469 (6th Cir. 1985)).

211. Butcher v. Bailey, 753 F.2d 465, 469 (6th Cir. 1985)(citing United States v. Doe, 465 U.S. 605, 613 n.11 (1984)).

212. *Id.* at 469 (citing United States v. Doe, 465 U.S. 605, 614 n.13 (1984)(quoting Fisher v. United States, 425 U.S. 391, 411 (1976))).

213. 425 U.S. 391 (1976).

214. 465 U.S. 605 (1984).

production of them would be sufficient authentication to permit their introduction as evidence.[215]

In *Butcher v. Bailey*,[216] the bankruptcy court ordered the debtor to turn over to the Chapter 7 trustee various personal records that related to property of the bankruptcy estate. On appeal, the Sixth Circuit quickly disposed of any argument regarding the first two *Doe* considerations. "As in *Fisher*, there is no serious doubt that personal records of debtor exist. Further, it is a foregone conclusion, bordering on a tautology, that [the] debtor has control of his personal records."[217] The Court felt differently about the third consideration, however. "As in *Doe*, however, and unlike *Fisher*, debtor's production of these records would be sufficient to authenticate them as his personal records. In any future criminal prosecution, therefore, the government would be relieved of the need to authenticate these records."[218] Thus, the Court concluded that the act of producing the records would be testimonial.

In *In re Lederman*,[219] the bankruptcy court reached a different conclusion with respect to a Chapter 11 debtor's books and records. In that case, the debtor's disclosure statement[220] indicated that the information contained in it was derived from the debtor's books, records, and files, and that such books, records, and files had been disclosed in their entirety to the creditors committee[221] and others. Based on these circumstances, the court concluded that "[b]ased on the previous disclosure of all of [the debtor's] books, records, and files . . . we believe that '[t]he existence and location of the documents were foregone conclusions. By conceding that he has the papers, the [debtor] would add little or nothing to the government's information.'"[222] As for authentication, the court cited *In re Connelly*[223] for the proposition that when documents have been prepared by third parties, the government would need to offer other authenticating testimony to have them admitted into evidence against an individual. Under such circum-

215. *See also In re* ICS Cybernetics, Inc., 107 B.R. 821, 830 (Bankr. N.D.N.Y. 1989)(holding that with respect to corporate records allegedly in the possession of a former corporate officer, "[t]he existence of records other than corporate documents required by law are not 'foregone conclusions' and their production . . . could amount to a 'formal testimonial admission.'").

216. 753 F.2d 465 (6th Cir. 1985).

217. *Id.* at 469.

218. *Id.* (citation omitted).

219. 140 B.R. 49 (Bankr. E.D.N.Y. 1992).

220. *See* 11 U.S.C. § 1125 (1994), *amended by* 98 Stat. 385, 98 Stat. 386.

221. *See id.* § 1102, *amended by* 100 Stat. 3101, 98 Stat. 384.

222. Charter Fed. Sav. Ass'n v. Rezak (*In re* Lederman), 140 B.R. 49, 56 (Bankr. E.D.N.Y. 1992)(second alteration in original)(quoting *In re* Connelly, 59 B.R. 421, 438 (Bankr. N.D. Ill. 1986)).

223. 59 B.R. 421, 438 (Bankr. N.D. Ill. 1986).

stances, requiring the production of such documents did not represent a substantial threat of self-incrimination.[224]

The third and final element that an individual seeking to avoid the production of documents on Fifth Amendment grounds must establish is that the act of producing the requested documents is "incriminating."[225] As the court noted in *Butcher*, "[i]t is here that the distinction between the production of documents and the contents of documents becomes murky."[226]

In most cases, it may be unnecessary to make such a distinction. If the contents of a document are not incriminating, the act of producing that document would not be incriminating. "There can be nothing incriminating about authenticating an innocuous document. Authentication cannot be incriminating unless the contents of the document tend to incriminate."[227] The same reasoning would seem to apply with respect to acknowledging that an innocuous document exists or that it is in the control of the individual producing it.

On the other hand, if the contents of a document are incriminating, the act of producing that document ordinarily would be incriminating. Producing the document could relieve the government of the need to establish the document's existence, location, and authenticity, each of which would constitute "a link in the chain of evidence needed to prosecute"[228] the debtor. Of course, if each of these considerations is a foregone conclusion, the chain of evidence needed to prosecute the debtor would be complete, and the act of producing the document—as opposed to the contents of the document—would not be incriminating. "If the [court] determines that the authentication of . . . the documents is a foregone conclusion, then it may order production of those documents regardless of their incriminating nature."[229]

If a witness concludes that complying with a request to testify or produce documents may result in the disclosure of incriminating information, she will need to know how to assert her Fifth Amendment rights. The Fifth Amendment offers no protection if the privilege against self-incrimination is not invoked in a timely and proper manner.

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224. Charter Fed. Sav. Ass'n v. Rezak (*In re* Lederman), 140 B.R. 49, 56 (Bankr. E.D.N.Y. 1992).

225. *See In re* Toyota of Morristown, Inc., 120 B.R. 925, 929 (Bankr. E.D. Tenn. 1990)(citing United States v. Doe, 465 U.S. 605 (1984); Butcher v. Bailey, 753 F.2d 465 (6th Cir. 1985)).

226. Butcher v. Bailey, 753 F.2d 465, 470 (6th Cir. 1985).

227. *Id.*

228. Hoffman v. United States, 341 U.S. 479, 486 (1951).

229. Butcher v. Bailey, 753 F.2d 465, 470 (6th Cir. 1985).

VI. INVOKING THE PRIVILEGE

While the defendant in a criminal proceeding has the absolute right to refuse to take the witness stand, "[i]n any other situation, the privilege [against self-incrimination] does not permit a person to avoid being sworn as a witness or being asked questions. Rather the person must listen to the questions and specifically invoke the privilege rather than answer the questions."[230]

Thus, for the witness who is not a criminal defendant, the privilege must be invoked with respect to each individual question. "[A] total or blanket assertion of privilege claimed in advance of the questions can run afoul of the 'reasonable cause to apprehend danger from a direct answer' standard mandated by [the Supreme Court in] *Hoffman* [*v. United States*[231]] . . . ."[232] Under that standard, an individual invoking the privilege must have "reasonable cause to fear self-incrimination if the question is answered."[233] Such reasonable cause may be found whenever a nexus exists between the possibility of prosecution and the answer to the question being posed.[234]

In *In re Hulon*,[235] the bankruptcy court applied these general principles in determining whether a debtor could refuse to be sworn at a Rule 2004 examination ordered by the court at the request of the Chapter 7 trustee. The debtor previously had testified at a § 341 meeting of creditors and was the subject of an ongoing criminal investigation. The court rejected the debtor's argument that under the circumstances the very act of being sworn was incriminating.

> The court is not persuaded that, because of the threat of incrimination of any relevant question, the debtor is totally excused from responding to relevant inquiries. The debtor is entitled to invoke the privilege only to genuinely threatening questions and therefore, is required to take the oath and listen to each question propounded by the trustee.[236]

In other words, one who wishes to invoke the privilege must have a basis for invoking it with respect to each question that he refuses to answer.

Once an individual invokes the Fifth Amendment, the court must determine the validity of the claim of privilege. "The witness is not exonerated from answering merely because he declares that in doing

230. *In re* Hulon, 92 B.R. 670, 675 (Bankr. N.D. Tex. 1988).
231. 341 U.S. 479 (1951).
232. Marine Midland Bank, N.A. v. Endres (*In re* Endres), 103 B.R. 49, 53-54 (Bankr. N.D.N.Y. 1989)(citation omitted).
233. New York City Shoes, Inc. v. Best Shoe Corp., 106 B.R. 58, 61 (E.D. Pa. 1989)(citing United States v. Apfelbaum, 445 U.S. 115 (1980); Mason v. United States, 244 U.S. 362 (1917)).
234. Marine Midland Bank, N.A. v. Endres (*In re* Endres), 103 B.R. 49, 54 (Bankr. N.D.N.Y. 1989)(citing *In re* Potter, 88 B.R. 843, 850 (Bankr. N.D. Ill. 1988)).
235. 92 B.R. 670 (Bankr. N.D. Tex. 1988).
236. *Id.* at 675 (citation omitted).

so he would incriminate himself—his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified . . . ."[237]

In keeping with the importance of the protection afforded by the Fifth Amendment, the individual's burden of persuasion is not particularly heavy in most cases.

> To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim "must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence."[238]

But, "if the incriminatory nature is not obvious from the question . . . the witness must explain in a limited fashion how his answer will be incriminatory."[239] This also would be true if the court initially decides that a question poses no real threat of self-incrimination. In this case, "it then becomes incumbent 'upon the defendant to show that answers to [the questions] might criminate him.'"[240] The individual must make "some positive disclosure . . . of [the question's] hidden dangers."[241] The court must then go further and "conduct a particularized inquiry into the scope and legitimacy of the claim with regard to each question asked."[242]

In some cases, the need to disclose at least partially the incriminating facts intended to be protected from disclosure obviously puts both the individual asserting the privilege and the court conducting the particularized inquiry in an awkward position.

> It is the nature of the inquiry into the witness's reasons for apprehending danger which has presented a difficult problem for courts, because of the tricky balance between a necessary investigation of the circumstances surrounding a claim of privilege and, by this investigation, the process of forcing a witness to surrender some of the protection afforded by the privilege.[243]

As noted by Judge Learned Hand, however, neither the individual nor the court has any other option.

> Obviously a witness may not be compelled to do more than show that the answer is likely to be dangerous to him, else he will be forced to disclose those very facts which the privilege protects. Logically, indeed, he is boxed in a par-

237. Hoffman v. United States, 341 U.S. 479, 486 (1951)(citing Rogers v. United States, 340 U.S. 362 (1951)).
238. *Id.* at 486-87 (quoting *Ex parte* Irvine, 74 F. 954, 960 (C.C.S.D. Ohio 1896)).
239. Marine Midland Bank, N.A. v. Endres (*In re* Endres), 103 B.R. 49, 54 (Bankr. N.D.N.Y. 1989)(citing United States v. Edgerton, 734 F.2d 913, 919 (2d Cir. 1983); *In re* J.M.V., Inc., 90 B.R. 737, 739 (Bankr. E.D. Pa. 1988)).
240. *In re* Ross, 156 B.R. 272, 281 (Bankr. D. Idaho 1993)(quoting United States v. Neff, 615 F.2d 1235, 1240 (9th Cir. 1980)(alteration in original)).
241. Hashagen v. United States, 283 F.2d 345, 350 (9th Cir. 1960).
242. Marine Midland Bank, N.A. v. Endres (*In re* Endres), 103 B.R. 49, 54 (Bankr. E.D.N.Y. 1989).
243. *In re* J.M.V., Inc., 90 B.R. 737, 739 (Bankr. E.D. Pa. 1988).

> adox, for he must prove the criminatory character of what it is his privilege to suppress just because it is criminatory. The only practicable solution is to be content with the door's being set a little ajar, and while at times this no doubt partially destroys the privilege . . . nothing better is available.[244]

In making the requisite showing, the individual asserting the privilege is not always required to offer testimony in support of the claim of privilege. In *In re French*,[245] the debtors operated a grain hauling business. Shortly before the filing of their Chapter 11 petition, the debtors allegedly sold a customer's grain without the customer's permission and kept the proceeds. At the continued § 341 meeting of creditors, Mr. French refused to answer six questions related to an equitable lien claimed by the feed mill to whom the debtors sold the grain; the debtors' bank accounts; and debtors' cashing of checks. In deciding that Mr. French could assert his Fifth Amendment privilege without giving testimony regarding the basis for his claim, the bankruptcy court noted that "[t]o avoid forcing the witness to risk self-incrimination in order to assert the privilege, potential incrimination is generally shown by argument of counsel."[246] The court elaborated that "[i]n practice, the invoker's attorney need only sketch a scenario of how a possible but still unknown response might provide direct or circumstantial evidence of criminal conduct or clues leading to evidence of criminal conduct."[247] Based upon the record before it, which did not include the debtors' testimony, the court found in Mr. French's favor.

> Mr. French is clearly entitled to refuse to answer ASCS' question regarding Peterson Feed Mill's alleged equitable lien . . . . The alleged equitable mortgage may have arisen from Mr. French's sales to Peterson Feed Mill of grain he did not own . . . . Mr. French is also entitled to refuse to answer the remaining five questions, all of which involve bank accounts and the cashing of checks. Mr. French must have cashed the checks he received from the alleged, illicit grain sales somewhere. Consequently, there is a reasonable probability that Mr. French would furnish "a link in the chain of evidence needed to prosecute" him if he truthfully answered questions regarding his bank accounts and check-cashing practices.[248]

Thus, a judge called upon to decide whether the privilege has been properly invoked is justified in using "common sense" in her analysis.

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244. United States v. Weisman, 111 F.2d 260, 262 (2d Cir. 1940). *See also* Marine Midland Bank, N.A. v. Endres (*In re* Endres), N.A. 103 B.R. 49, 54 (Bankr. E.D.N.Y. 1989)("That this minimal showing might partially comprise the very privilege, and protection, sought to be asserted cannot be avoided in maintaining the delicate balance between a litigant's right to information and a witness' constitutional right to invoke his or her Fifth Amendment privilege.").

245. 127 B.R. 434 (Bankr. D. Minn. 1991).

246. *Id.* at 437.

247. *Id.* (quoting Robert Heidt, *The Conjurer's Circle—The Fifth Amendment Privilege in Civil Cases*, 91 YALE L.J. 1062, 1073 (1982)).

248. *Id.* at 439-40 (quoting *In re* Morganroth, 718 F.2d 161, 167 (6th Cir. 1983)).

The individual asserting the privilege, however, may be required to testify in support of the claim of privilege in certain circumstances. For example, in *In re Morganroth*,[249] the witness refused to answer certain questions that he had been asked and had answered in a different proceeding before a different court. The witness claimed that by truthfully answering the questions in the pending proceeding, he might incriminate himself for perjury in the earlier proceeding. The court, however, concluded that under such circumstances the witness' statement under oath was necessary to support a determination that his assertion of the privilege was proper.

> The *Hoffman* guidelines [permitting reliance upon the arguments of counsel in lieu of testimony] . . . are of little help in a case . . . where the . . . [c]ourt making the privilege determination has no personal knowledge of the scope of content of prior proceedings and where the only possible prosecution for which the witness is at risk is perjury . . . . In *Hoffman*, . . . [the witness'] invocation of the privilege was to protect against the prosecution for substantive crimes. Therefore, the elements of the underlying violation and the necessary facts to support them could be inferred by the trial court.[250]

Thus, where the court has insufficient information to assess the underlying factual basis for an individual's Fifth Amendment claim,

> a witness must supply personal statements under oath or provide evidence with respect to each question propounded to him to indicate the nature of the criminal charge which provides the basis for his fear of prosecution and, if necessary to complement non-testimonial evidence, personal statements under oath to meet the standard for establishing reasonable cause to fear prosecution . . . .[251]

In *Martin-Trigona v. Gouletas*,[252] a judgment debtor under indictment for theft, forgery, and mail fraud refused to answer questions put to him by the judgment creditor in a supplementary proceeding intended to discover assets. The trial court was unable to determine the incriminating nature of such seemingly innocent matters as the debtor's place of birth, his current address, and any litigation to which he was a party. Thus, the trial court demanded the debtor explain more fully the basis for his claim of privilege with respect to such questions. The court of appeals agreed with the trial court's analysis. "Clearly some additional explanation was called for and the district court correctly concluded that [the judgment debtor] . . . could safely offer additional explanation without risking incrimination from the explanation itself."[253] The court of appeals was careful to note that the trial court properly upheld the debtor's refusal to answer a

249. 718 F.2d 161 (6th Cir. 1983).

250. *Id.* at 168.

251. *Id.* at 169-70.

252. 634 F.2d 354 (7th Cir. 1980)(per curiam), *cert. denied*, 449 U.S. 1025 (1980).

253. *Id.* at 361.

number of other, less innocuous questions, without requiring the debtor to testify in support of the claim of privilege.[254]

In *In re Connelly*,[255] the bankruptcy court was confronted with a Chapter 7 debtor who disclosed only his name, social security number, and post office address on his petition. The debtor refused on Fifth Amendment grounds to provide the information requested in his schedules and statements, and refused to testify at his § 341 meeting of creditors. After first noting that this was "not the ordinary case where the privilege is asserted in a discrete adversary proceeding or hearing and does not impede basic bankruptcy administration,"[256] the court concluded that

> [Debtor] must tender to the court some credible reason why fulfilling his statutory duties and disclosing specific information or surrendering certain property to the trustee poses a real danger of incrimination, not a remote and speculative possibility. . . .
>
> . . . [Debtor's] sworn statement by personal affidavit will be required because the possible penalty of perjury may be the sole assurance against debtor's spurious assertion of the Fifth Amendment. . . . [Debtor's] counsel may supply argument therefrom but not the facts necessary for the court's determination.[257]

Read broadly, *Connelly* could stand for the proposition that an individual must always testify in support of a claim of privilege.[258]

If the court determines there is insufficient justification for an individual's claim of privilege, the individual may be ordered to answer the question giving rise to the claim. "A witness may be compelled to answer a question if it is clear that she or he is mistaken with regard to the justification for the privilege."[259] Nevertheless, it should be "'perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer *cannot possibly* have such tendency' to incriminate."[260] The individual asserting the privilege is entitled to every benefit of the doubt.[261]

At the same time, however, the individual asserting the privilege is not always entitled to its protection. In some situations, the individual's prior conduct may amount to a waiver of the privilege. To avoid this pitfall, attorneys carefully need to prepare their clients before allowing them to make any oral or written statements that might tend to incriminate them.

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254. *Id.* at 360.
255. 59 B.R. 421 (Bankr. N.D. Ill. 1986).
256. *Id.* at 430.
257. *Id.* at 445 (citations omitted).
258. *See In re* French, 127 B.R. 434, 437 (Bankr. D. Minn. 1991).
259. New York City Shoes, Inc. v. Best Shoe Corp., 106 B.R. 58, 61 (E.D. Pa. 1989).
260. Hoffman v. United States, 341 U.S. 479, 488 (1951)(citing Temple v. Commonwealth, 75 Va. 892, 899 (1880)(emphasis in original)).
261. *In re* Corrugated Container Antitrust Litig., 661 F.2d 1145, 1151 (7th Cir. 1981), *aff'd sub nom.*, Pillsbury Co. v. Conboy, 459 U.S. 248 (1983).

VII. WAIVER

The Fifth Amendment privilege against self-incrimination is waived[262] if it is not invoked.[263] For many years, a waiver of the privilege had to be knowing and intelligent.[264] That is no longer the case in a noncustodial setting. In *Garner v. United States*,[265] the Supreme Court held "that an individual may lose the benefit of the privilege [against self-incrimination] without making a knowing and intelligent waiver."[266] Such a waiver may now "be inferred from a witness' course of conduct or prior statements concerning the subject of the case."[267] Yet, "a waiver will not be lightly inferred,"[268] and "[c]ourts indulge every reasonable presumption against finding a testimonial waiver."[269]

In considering whether an individual has waived the privilege against self-incrimination, it is important to understand the distinction between testimony that merely provides the details concerning the facts to which the individual has previously testified and testimony that provides new facts. The Supreme Court explained the distinction in *Rogers v. United States*.[270]

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262. It has been argued that "[t]he word 'waiver' is no longer used in the context of the privilege against self-incrimination. A witness is now said to 'lose the benefit' of the privilege against self-incrimination." Torcie v. Ruff (*In re* Growers Packing Co., Inc.), 150 B.R. 82, 83 n.1 (Bankr. S.D. Fla. 1993)(citing Minnesota v. Murphy, 465 U.S. 420, 427-28 (1984); Garner v. United States, 424 U.S. 648, 653-54 (1976)).

263. Rogers v. United States, 340 U.S. 367, 371 (1951)(citing United States v. Murdock, 284 U.S. 141, 148 (1931)).

264. *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Klein v. Harris, 667 F.2d 274, 287 (2d Cir. 1981); United States v. St. Pierre, 132 F.2d 837, 840 (2d Cir. 1942).

265. 424 U.S. 648 (1976).

266. *Id.* at 654 n.9. *See also* Stacey v. Solem, 801 F.2d 1048, 1050 (8th Cir. 1986).

267. Horowitz v. Sheldon (*In re* Donald Sheldon & Co.), 193 B.R. 152, 162 (Bankr. S.D.N.Y. 1996)(citing Klein v. Harris, 667 F.2d 274, 287 (2d Cir. 1981)). *See also* Edmond v. Consumer Protection Div. (*In re* Edmond), 934 F.2d 1304, 1307-08 (4th Cir. 1991); Charter Fed. Sav. Ass'n v. Rezak (*In re* Lederman), 140 B.R. 49 (Bankr. E.D.N.Y. 1992); Holiday Bank v. Scarfia (*In re* Scarfia), 104 B.R. 462 (Bankr. M.D. Fla. 1989), *aff'd*, 129 B.R. 671 (M.D. Fla. 1990); Norbank v. Kroh (*In re* Kroh), 87 B.R. 1004, 1005 (Bankr. W.D. Mo. 1988); Rivoli Grain Co. v. Litton (*In re* Litton), 74 B.R. 557, 560 (Bankr. C.D. Ill. 1987).

268. *In re* Hulon, 92 B.R. 670, 673 (Bankr. N.D. Tex. 1988)(citing Klein v. Harris, 667 F.2d 274, 287 (2d Cir. 1981).

269. *In re* Hulon, 92 B.R. 670, 673 (Bankr. N.D. Tex. 1988) (citing Klein v. Harris, 667 F.2d 274, 287 (2d Cir. 1981)(citations omitted)). *But see* Scarfia v. Holiday Bank, 129 B.R. 671, 675 (Bankr. M.D. Fla. 1990)("A debtor seeking relief from his obligations pursuant to the Bankruptcy Code and in a Bankruptcy Court does so willingly and voluntarily and is not entitled to as much consideration in being compelled to testify as would another witness who had no interest in the proceeding.").

270. 340 U.S. 367 (1951).

> Since the privilege against self-incrimination presupposes a real danger of legal detriment arising from the disclosure, [an individual] cannot invoke the privilege where response to the specific question in issue . . . would not further incriminate her. Disclosure of a fact waives the privilege as to details. Thus, if the [witness] himself elects to waive his privilege . . . and discloses his criminal connections, he is not permitted to stop, but must go on and make a full disclosure . . . . As to each question to which a claim of privilege is directed, the court must determine whether the answer to that particular question would subject the witness to a "real danger" of further crimination.[271]

Thus, where an individual's subsequent testimony would only flesh out her prior testimony, a waiver is likely to be found.

Courts are reluctant to allow an individual to rely on the privilege against self-incrimination as a shield after he has previously offered a one-sided version of the facts as a sword swung at the other side.

> To allow the Debtor to plead a blanket Fifth Amendment privilege [after having testified] and refuse to answer any further questions on the subjects covered in his earlier testimony would allow the Debtor to prematurely close the door which he freely opened. The law, however, does not permit a witness to open the door just wide enough to offer the Court an impaired view of the facts. Once the witness voluntarily opens the door, the Court may open it completely, and scrutinize every exposed matter.[272]

Nevertheless, it is generally accepted that an individual may "refuse to answer any questions about a matter already discussed, even if the facts already revealed are incriminating, as long as the answers sought may tend to further incriminate [her]."[273]

In *Klein v. Harris*,[274] the Second Circuit adopted what has come to be the most widely-accepted test for determining whether an individual has waived the Fifth Amendment privilege against self-incrimination. Under that test, a waiver may be found if

> (1) the witness' prior statements have created a significant likelihood that the finder of fact will be left with and prone to rely on a distorted view of the truth; and (2) the witness had reason to know that his prior statements would be interpreted as a waiver of the fifth amendment's privilege against self-incrimination.[275]

Both prongs of this test must be established before a waiver will be found.

The first prong of the *Klein* test has its roots in Judge Learned Hand's opinion in *United States v. St. Pierre*.[276]

> It must be conceded that the privilege is to suppress the truth, but that does not mean that it is a privilege to garble it; although its exercise deprives the parties of evidence, it should not furnish one side with what may be false evi-

271. *Id.* at 372-74 (quoting Brown v. Walker, 161 U.S. 591, 597 (1896)).
272. *In re* Mudd, 95 B.R. 426, 430 (Bankr. N.D. Tex. 1989).
273. Illinois v. McCulloch (*In re* Master Key Litig.), 507 F.2d 292, 294 (9th Cir. 1974). *See also* United States v. Seifert, 648 F.2d 557, 561 (9th Cir. 1980); Shendal v. United States, 312 F.2d 564, 566 (9th Cir. 1963).
274. 667 F.2d 274, 287 (2d Cir. 1981).
275. Klein v. Harris, 667 F.2d 274, 287 (2d Cir. 1981).
276. 132 F.2d 837 (2d Cir. 1942).

> dence and deprive the other of any means of detecting the imposition. The time for the witness to protect himself is when the decision is first presented to him; he needs nothing more, and anything more puts a mischievous instrument at his disposal.[277]

In other words,

> [o]nce a witness testifies about an issue, the witness may not relate only part of the story and decide to stop. Rather, the witness must fully disclose what he started to recount and be amenable to cross-examination on the topic. After the witness testifies, that witness may not claim the privilege because it would lead to distortion of the facts. The court's concern is whether the prior statements have "created a significant danger of distortion," because waiver of the privilege should only be recognized in the "most compelling of circumstances."[278]

Such compelling circumstances "do not exist unless a failure to find a waiver would unduly prejudice" the other party to the proceeding.[279] This would occur "if the finder of fact is left with misleading information and likely to rely on that information."[280]

The importance of a finding of reliance upon the misleading information is demonstrated in *E.F. Hutton & Co. Inc. v. Jupiter Development Corp.*[281] In that case, an individual filed an affidavit in support of a third-party complaint. One of the other parties to the lawsuit argued that by submitting this affidavit, the affiant had waived his Fifth Amendment privilege against self-incrimination. The court rejected this argument and upheld the affiant's claim of privilege, reasoning that because it had denied the motion to file the third-party complaint as untimely, it had not relied upon the affidavit. Therefore, no party had been prejudiced, even if the affidavit had created a distorted view of the facts.

A similar result was reached, at least initially, in *John P. Maguire & Co. v. Sapir (In re Candor Diamond Corp).*[282] In that case, one of the debtor's officers submitted an affidavit in support of her opposition to an order to show cause. The officer briefly testified at a preliminary hearing, but then refused to answer questions at an examination ordered by the court. The plaintiff moved to compel the officer's testimony, arguing that she had waived her Fifth Amendment privilege by submitting the affidavit and testifying at the preliminary hearing. In denying the plaintiff's motion, the court found that because it had en-

277. *Id.* at 840.
278. Horowitz v. Sheldon (*In re* Donald Sheldon & Co.), 193 B.R. 152, 163 (Bankr. S.D.N.Y. 1996)(citing United States v. St. Pierre, 132 F.2d 837, 840 (2d Cir. 1942); Rogers v. United States, 340 U.S. 367, 371 (1951); Klein v. Harris, 667 F.2d 274, 287 (2d Cir. 1981)).
279. *In re* Hulon, 92 B.R. 670, 674 (Bankr. N.D. Tex. 1988).
280. Horowitz v. Sheldon (*In re* Donald Sheldon & Co.), 193 B.R. 152, 163 (Bankr. S.D.N.Y. 1996)(citing E.F. Hutton & Co. v. Jupiter Dev. Corp., 91 F.R.D. 110, 116 (S.D.N.Y. 1981)).
281. 91 F.R.D. 110, 116 (S.D.N.Y. 1981).
282. 21 B.R. 147 (Bankr. S.D.N.Y. 1982).

tered default judgment in favor of the plaintiff in the underlying adversary proceeding, it had not relied upon either the officer's affidavit or her testimony. Under the circumstances, the court held that even if the affidavit and testimony presented a distorted view of the facts, the plaintiff had not been prejudiced, and the officer had not waived her Fifth Amendment rights. When the default judgment was subsequently vacated on appeal, however, the court reached a different conclusion.

> The only reason why waiver of the privilege was not found in the prior decision of this Court was because the entry of a default judgment in the case had vitiated any "significant likelihood that the court would be forced to rely upon a distorted view of the truth". But with the vacating of the default judgment and the reopening of the case, there is *now* significant likelihood of distortion if the court is left with the witness's unchallenged and unsupported version of the facts .... The opening of the default judgment ... necessitates a finding that the first prong of the *Klein* test has been met.[283]

In *In re Donald Sheldon & Co., Inc.*,[284] the Chapter 7 trustee obtained a judgment against Donald Sheldon, the debtor's principal, and scheduled a deposition in an attempt to discover assets against which he might levy. At the deposition, Sheldon answered either "I don't know" or "I don't recall" to most of the trustee's questions. The deposition was continued, and at the continued deposition, Mr. Sheldon asserted his Fifth Amendment privilege against self-incrimination. In rejecting the trustee's argument that Sheldon's testimony at the initial deposition constituted a waiver of his Fifth Amendment rights, the bankruptcy court noted that

> [t]he Trustee concedes that he has not relied on Mr. Sheldon's testimony. The Trustee states that Mr. Sheldon "has told us nothing." The invocation of the privilege, after Mr. Sheldon's initial testimony, leaves the Trustee in the same position as prior to that testimony. Thus, given the content of that prior testimony, the Trustee is not now prejudiced by Mr. Sheldon's decision to avail himself of the privilege. While eliciting the information would be useful in the Trustee's efforts to locate assets, he has not been prejudiced because Mr. Sheldon's vague statements added nothing new.[285]

Finding no distortion, the court concluded that the proceeding was "in the same posture as if Mr. Sheldon had initially invoked the Fifth Amendment privilege"[286] and upheld the claim of privilege.[287]

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283. John P. Maguire & Co. v. Magolies (*In re* Candor Diamond Corp.), 42 B.R. 916, 920 (Bankr. S.D.N.Y. 1984).

284. 193 B.R. 152 (Bankr. S.D.N.Y. 1996).

285. *Id.* at 164 (citation omitted).

286. *Id.* at 165.

287. One other aspect of the *Horowitz* case bears mentioning. In response to the principal's argument that because there was no case or controversy, there was no finder of fact, the bankruptcy court ruled that

> [f]or the narrow purposes of the deposition, which is a proceeding to ascertain the location of [the principal's] assets, this Court holds that the Trustee is the finder of fact. The proceeding is not an ordinary investigation. Rather, it is a deposition conducted under oath pursuant to a fed-

The second prong of the *Klein* test is established if an individual's prior statement was both testimonial, "that is, voluntarily made under oath in the same proceeding,"[288] and incriminating.[289] The requirement that the prior statement be made in the same proceeding is of particular importance to bankruptcy practitioners because of the possibility that a single bankruptcy case may involve a number of proceedings.

> The jurisdictional statutes promulgated by Congress . . . make a distinction between the terms "case" and "proceeding." Many proceedings may be brought within a single . . . case . . . . A separate adversary proceeding would relate to but would not necessarily be the same "proceeding" as the § 341 meeting governing the administration of the case. Consequently, the waiver concept may not apply in serial proceedings in a bankruptcy case.[290]

Thus, a debtor's testimony at a deposition taken in connection with one adversary proceeding might constitute a waiver of her Fifth Amendment rights in that adversary proceeding, but she still would be permitted to claim the privilege against self-incrimination in a separate adversary proceeding.

It could be argued, however, that a contested matter, an adversary proceeding, or any other event that transpires in a bankruptcy case should be considered a part of the larger "bankruptcy proceeding." In that event, a waiver at any stage of the case would bar the later assertion of the privilege. Under the circumstances, and given the consequences of a finding of waiver, counsel would be well–advised to instruct their clients to assert the privilege at the earliest opportunity.

The requirement that the prior statement be incriminating is satisfied if the prior statement "might provide a clue leading investigators to discover facts that could constitute links in a chain of circumstantial evidence proving the invoker's criminal conduct."[291] This is the same standard used by the courts to determine whether an answer is incriminating when an individual invokes the Fifth Amendment.[292] One therefore might expect that if an individual could have successfully invoked the Fifth Amendment before testifying previously, but did not, the second prong of the *Klein* test would be established.

In *In re Hulon*,[293] however, the bankruptcy court focused on the *Klein* court's use of the phrase "had reason to know" and found that because most of the debtor's testimony at the § 341 meeting of credi-

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> eral rule. This Court finds it untenable that in a proceeding conducted under oath there could be no circumstances under which the privilege would be waived.

Id. at 164.

288. *Id.* at 163.
289. Klein v. Harris, 667 F.2d 274, 288 (2d Cir. 1981).
290. *In re* Hulon, 92 B.R. 670, 674 (Bankr. N.D. Tex. 1988).
291. *Id.*
292. *See* Hoffman v. United States, 341 U.S. 479, 486 (1951).
293. 92 B.R. 670 (Bankr. N.D. Tex. 1988).

tors had been elicited by her own attorney, she had no reason to know that her answers might be incriminating.

> Courts expect and encourage debtors to be represented by attorneys. If a debtor stands in open court and knowingly and intelligently forfeits rights and privileges, a court may hold the debtor responsible for the consequences. But if the complexity of the law forces a person to speak through an attorney, the ability of the attorney to waive the rights of the person should be extremely limited. Here, the debtor could not have expected that responding to her own lawyer's questions would amount to a waiver of her fifth amendment privilege.[294]

The court's finding appears to be inconsistent with the Supreme Court's holding in *Garner* that a waiver need not be knowing and intelligent. On the other hand, it simply may represent the court's attempt to give the debtor every benefit of the doubt in applying the second prong of the *Klein* test.[295]

Even if it is not waived, the privilege against self-incrimination may not prove to be the panacea sought by the individual invoking it. In civil cases, the court is permitted to draw an adverse inference against such an individual. The possible consequences of such an adverse inference therefore should always be considered before invoking the privilege.

VIII. ADVERSE INFERENCE

While the Fifth Amendment permits an individual to refuse to testify, a debtor's "refusal to testify may not be transformed into an assertion of innocence."[296] To the contrary, the Supreme Court held in *Baxter v. Palmigiano*[297] that "the prevailing rule [is that] 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 a civil cause.'"[298] Thus, bankruptcy courts may draw an "adverse inference" from an individual's silence following a claim of privilege.[299]

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294. *Id.* at 675.

295. The court could have avoided the issue altogether by finding that the § 341 meeting of creditors, at which the prior testimony was given, and the Rule 2004 examination, at which the privilege was asserted, were separate proceedings (the court assumed, apparently for the sake of argument, that they were part of the same proceeding) or by deciding the matter based on its finding that the Chapter 7 trustee had not demonstrated that the debtor's responses at the § 341 meeting were incriminating. *See id.* at 674.

296. Raymond James & Assoc. v. Metzgar (*In re* Metzgar), 127 B.R. 708, 711 (Bankr. M.D. Fla. 1991)(citing Chrysler Capital Corp. v. Salzman (*In re* Salzman), 61 B.R. 878, 900 (Bankr. S.D.N.Y. 1986)).

297. 425 U.S. 308 (1976).

298. *Id.* at 318 (quoting 8 J. WIGMORE, EVIDENCE 439 (McNaughton rev. 1961)).

299. *See, e.g.*, Grossman v. Murray (*In re* Murray), 162 B.R. 384 (Bankr. D. Mass. 1993); General Motors Acceptance Corp. v. Bartlett (*In re* Bartlett), 154 B.R. 827

Such an adverse inference "is permitted where [an individual] asserts his privilege on matters peculiarly within his knowledge and where there is independent evidence supporting the adverse fact being inferred"[300] and may be drawn at either the summary judgment stage or trial.[301] Yet, an adverse inference has no *per se* effect.

> *Baxter* [*v. Palmigiano*] did no more than permit an inference to be drawn in a civil case from a party's refusal to testify. Respondent's silence in *Baxter* was only one of a number of factors to be considered by the finder of fact in assessing a penalty, and was given no more probative value than the facts of the case warranted . . . .[302]

A party asking a bankruptcy court to draw an adverse inference from an individual's silence must still prove up its case.

> A plaintiff seeking to rely on a Fifth Amendment inference must first offer evidence which at least tends to prove each part of the plaintiff's case. Once that has been done, the Court can then add to the weight of the other evidence by use of the inference. However, the invocation of the Fifth Amendment privilege, standing alone, is not sufficient evidence to constitute probative proof of a plaintiff's case. If a plaintiff offers no evidence of fraud . . . the inference drawn from invocation of the Fifth Amendment does not by itself establish fraud.[303]

For example, in *Chicago Title Insurance Co. v. Mart* (*In re Mart*),[304] a creditor objected to the debtor's discharge, arguing in part that the bankruptcy court should draw an adverse inference from the fact the debtor had invoked the privilege against self-incrimination. In particular, the creditor asked the court to infer that the debtor had "guilty knowledge" of the wrongful diversion, transfer, and concealment of certain funds. As there was little, if any, other evidence of such knowledge on the part of the debtor, the court found in the debtor's favor.

In *In re Caucus Distributors Inc.*,[305] the United States filed involuntary petitions against three related debtors. Having no direct evidence of the debtors' financial condition at the time the petitions were filed, the government urged the bankruptcy court to infer that the debtors were not paying their debts when due, based upon the debtors'

(Bankr. D.N.H. 1993); Charter Fed. Sav. Ass'n v. Rezak (*In re* Lederman), 140 B.R. 49 (Bankr. E.D.N.Y. 1992); Raymond James & Assoc. v. Metzgar (*In re* Metzgar), 127 B.R. 708 (Bankr. M.D. Fla. 1991); Marine Midland Bank, N.A. v. Endres (*In re* Endres), 103 B.R. 49 (Bankr. N.D.N.Y. 1989).

300. Erie Materials, Inc. v. Oot (*In re* Oot), 112 B.R. 497, 501 (Bankr. N.D.N.Y. 1989)(citing Baxter v. Palmigiano, 425 U.S. 308, 318; Machado v. Commanding Officer, 860 F.2d 542, 544-45 (2d Cir. 1988)).

301. Young Sik Woo v. Glantz, 99 F.R.D. 651 (D.R.I. 1983).

302. Lefkowitz v. Cunningham, 431 U.S. 801, 808 (1977).

303. Trustmark Nat'l Bank v. Curtis (*In re* Curtis), 177 B.R. 717, 720 (Bankr. S.D. Ala. 1995).

304. 90 B.R. 547 (Bankr. S.D. Fla. 1988).

305. 106 B.R. 890 (Bankr. E.D. Va. 1989).

representatives' invocation of the Fifth Amendment. This the court declined to do.

> While this Court is aware that the drawing of negative inferences is appropriate under certain circumstances, it is unwilling and without authority to infer beyond what the independent evidence establishes. In view of the government's inability to proffer direct and timely evidence pertaining to the debtors' financial status, or "independent" evidence enabling this Court to draw "inferences" against the debtors in view of their invocation of the Fifth Amendment, we find that the government has failed to establish that the debtors generally were not paying their debts as they became due as of... the date the petitions were filed.[306]

Clearly, the party seeking to rely upon the adverse inference has to make some affirmative showing, however slight, to support its position. It cannot rely exclusively upon the failure to testify.

In *United States v. Stelweck (In re Stelweck)*,[307] the government filed adversary complaints against the debtors in two related Chapter 7 cases, alleging that the debtors submitted fraudulent claims for reimbursement to Medicare, and asking the bankruptcy court to except the debtors' obligations to it from discharge.[308] At trial, the government was able to establish to the bankruptcy court's satisfaction three of the five elements of its case: the debtors made representations; the government relied on those representations; and, assuming all four of the other elements were established, the government sustained damages as a proximate result of those representations. But, the government was unable to produce direct evidence that the debtors' representations were in fact false or that such representations were made with the intent of deceiving the government. The court declined "to draw the adverse inferences from the [debtors'] invocation of their Fifth Amendment rights to fill in the gaps in [the government's] case."[309]

> Absent substantial and compelling independent evidence of the required elements of fraud under § 523(a)(2)(A), it would be inappropriate to allow a plaintiff to establish such fraud simply by the fact that a defendant invoked the Fifth Amendment. If the court adopted such reasoning, we would be endangering the right of a debtor who invoked his or her Fifth Amendment privilege to a discharge in bankruptcy. We believe such a position would be both unwise and would unduly penalize a debtor for invocation of the Fifth Amendment privilege.[310]

Once a party establishes a prima facie case, the effect of an adverse inference is to shift the burden of producing evidence to the individual

306. *Id.* at 922 (citations omitted).

307. 86 B.R. 833 (Bankr. E.D. Pa. 1988).

308. *See* 11 U.S.C. § 523 (1994).

309. United States v. Stelweck (*In re* Stelweck), 86 B.R. 833, 850 (Bankr. E.D. Pa. 1988).

310. *Id.*

invoking the Fifth Amendment.[311] If that individual remains silent in the face of the facts established by the other party, the bankruptcy court may then infer that she is unable to deny the other party's allegations.[312]

In *Chrysler Capital Corp. v. Salzman (In re Salzman)*,[313] the debtors guaranteed an obligation of the corporation of which they were the principal shareholders and officers to the plaintiff. This obligation was secured by an assignment of the corporation's accounts receivable. In its complaint, which sought to except from discharge its claims against the debtors, the plaintiff alleged that the debtors, on behalf of the corporation, had submitted to it false invoices for uncompleted work and forged bills of lading for unshipped merchandise. At trial, the plaintiff established to the bankruptcy court's satisfaction that the debtors knew or should have known whether the invoices and bills of lading were legitimate. Because this evidence was not rebutted due to the debtors' invocation of the Fifth Amendment, the court drew an adverse inference that the debtors could not rebut the plaintiff's evidence and ruled in the plaintiff's favor.

> Significantly, the issue as to the debtors' intent to defraud can best be negated by the debtors themselves, since their state of mind is in issue .... [W]hen a debtor refuses to testify in response to probative evidence offered against him ... it is proper for the Bankruptcy Court to draw adverse inferences from his invocation against self-incrimination. Not only has the plaintiff established a *prima facie* case that the debtors submitted fictitious invoices which they represented to be bona fide, so that the burden of producing evidence shifted to the debtors to show that they did not intend to deceive the plaintiff, but the plaintiff has also established by clear and convincing evidence that the debtors' actions were intended to, and did, deceive the plaintiff.[314]

In *Erie Materials, Inc. v. Oot (In re Oot)*,[315] the debtor was a general contractor who contracted with two homeowners to replace a number of windows in their home. The debtor purchased the windows from the plaintiff, installed them, and accepted payment from the homeowners, but did not pay the plaintiff for the windows. When the debtor subsequently filed bankruptcy, the plaintiff filed an adversary complaint, seeking a determination that its claim against the debtor was nondischargeable due to the debtor's fraud or defalcation while acting as a fiduciary.[316] At trial, the plaintiff offered the following evidence: its invoices, which were signed by the debtor to acknowledge receipt of the windows, to prove the debtor purchased the windows

311. *See* Chrysler Capital Corp. v. Salzman (*In re* Salzman), 61 B.R. 878, 890 (Bankr. S.D.N.Y. 1986).
312. *See* Chase Manhattan Bank, N.A. v. Frenville, 67 B.R. 858, 862 (Bankr. D.N.J. 1986).
313. 61 B.R. 878, 890 (Bankr. S.D.N.Y. 1986).
314. *Id.* at 890-91 (citations omitted).
315. 112 B.R. 497 (Bankr. N.D.N.Y. 1989).
316. *See* 11 U.S.C. § 523(a)(4) (1994).

from it; the testimony of one of the homeowners and a receipt for payment in full, signed by the debtor, to prove that the homeowners paid the debtor; and the testimony of its treasurer, to prove the amount owed to the plaintiff for the windows. Plaintiff was unable to offer direct evidence of the debtor's actual diversion of the funds because when the debtor was called to testify and to identify the ledger for the project, he invoked his Fifth Amendment privilege and refused to testify. As a result, the ledger was not admitted into evidence. Under New York law, however, a contractor is required to maintain a record of all payments received in trust for a materialman.[317] The plaintiff therefore argued that the court could draw an adverse inference that the ledger would establish the debtor's diversion of the funds from the debtor's invocation of the privilege. The court agreed and found the claim to be nondischargeable.

> The information in the alleged ledger documents which was protected by Debtor's assertion of his Fifth Amendment privilege, here, is exclusively within the Debtor's knowledge, however, uncontroverted testimonial and documentary evidence exists independently of Debtor's alleged ledgers which warrant the inference of diversion. Thus, while the Debtor is permitted to assert his privilege as a protective shield, he is not also allowed to convert it into a sword to strike out an inference warranted by the circumstances here.[318]

In *Hazelip v. Horridge (In re Horridge)*,[319] two creditors objected to the debtors' discharge on the ground that the debtors had failed to explain satisfactorily a loss of assets. In support of their motion for summary judgment, the creditors offered a financial statement signed by the debtors fewer than than eighteen months prior to the filing of their petition and schedules. The financial statement showed total assets of nearly $3.6 million; the schedules showed assets of only $41,004. Rather than offer any explanation for the apparent loss of $3.5 million over a seventeen-month period, the debtors claimed the Fifth Amendment and refused to testify. The court agreed with the creditors that it could draw an adverse inference from the debtors' refusal to testify.

> Plaintiffs must make a *prima facie* case by showing [the debtors] had a sudden and drastic loss of assets just prior to the filing of bankruptcy. The financial statement . . . and the [schedules] presented by Plaintiffs have satisfied this requirement. Accordingly, the burden of going forward with the evidence to explain satisfactorily any loss of assets shifted to [the debtors]. [The debtors] have failed to provide any explanation as to their severe reduction in assets.[320]

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317. *See* N.Y. LIEN LAW art. 3-A (McKinney 1989).

318. Erie Materials, Inc. v. Oot (*In re* Oot), 112 B.R. 497, 501 (Bankr. N.D.N.Y. 1989)(citing United States v. Robinson, 485 U.S. 25 (1988)).

319. 127 B.R. 798 (Bankr. S.D. Tex. 1991).

320. *Id.* 798-99 (citation omitted).

Having drawn such an inference, the court granted the creditors' motion for summary judgment and denied the debtors a discharge.[321]

The possibility that the court might draw an adverse inference from a debtor's silence is not the only possible negative consequence of invoking the privilege against self-incrimination. Some of the other possible negative consequences are explored in the next Part.

IX. OTHER NEGATIVE CONSEQUENCES

The Supreme Court has long held that an individual who properly invokes the Fifth Amendment privilege against self-incrimination may not be punished for doing so. "[A] State may not impose substantial penalties because a witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself."[322] Nevertheless, "the courts have never held that a Fifth Amendment claimant in a civil proceeding must be shielded from all possible negative consequences that may attend his invocation of the privilege."[323] An adverse inference drawn from an individual's silence is an example of one such "negative consequence."

The difference between a prohibited punishment and a permitted negative consequence is often very slight. Perhaps the best explanation of that difference is the one offered by the court in *In re Moses*.[324]

> Under the *Lefkowitz* [*v. Cunningham*[325]] line [of cases prohibiting punishing the individual claiming the privilege], the penalty was imposed either to punish the claimant or to compel testimony, or both. Under the *Baxter* [*v. Palmigiano*[326]] line [of cases permitting the individual claiming the privilege to suffer negative consequences], however, the penalty was imposed either to facilitate the proceeding or to make it more equitable for the non-invoking party. . . .
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> . . . .

321. A bankruptcy court may be more likely to draw an adverse inference in certain cases than in others. One example of such a case is when a Chapter 11 or Chapter 12 debtor in possession invokes the privilege against self-incrimination in response to a creditor's motion to remove the debtor in possession for fraud or mismanagement, which seems inherently inconsistent with the debtor in possession's fiduciary duties.

322. Lefkowitz v. Cunningham, 431 U.S. 801, 805 (1977). *See also* Lefkowitz v. Turley, 414 U.S. 70 (1973)(finding a violation of Fifth Amendment to cancel architects' contracts with the state because of their refusal to testify); Gardner v. Broderick, 392 U.S. 273 (1968)(finding a violation to discharge a policeman because of his refusal to waive his privilege); Garrity v. New Jersey, 385 U.S. 493 (1967)(finding a violation to coerce statements from a policeman under the threat of discharge); Spevack v. Klein, 385 U.S. 511 (1967)(finding a violation to disbar an attorney because of his refusal to testify or produce documents in connection with a disciplinary proceeding).

323. *In re* Moses, 792 F. Supp. 529, 536 (E.D. Mich. 1992).

324. *Id.*

325. 431 U.S. 801 (1977).

326. 425 U.S. 308 (1976).

> The core distinction between the two lines of cases, then, is the motivation behind the cost imposed on the claimant. A negative consequence may not be used solely to punish a claimant for having invoked his privilege. It may, however, be used to compensate the non-invoking party or to better administer the proceeding.[327]

In the context of a bankruptcy case, one such possible negative consequence of claiming the privilege is the dismissal of the case.[328] In *Moses*, the debtor refused to testify regarding certain assets. The bankruptcy court denied a creditor's motion to dismiss, declining to follow whatever authority might suggest that a debtor's refusal to testify was a ground for dismissal. On appeal, the district court analyzed both the *Lefkowitz* and *Baxter* line of cases and determined that under the appropriate circumstances, dismissal was necessary to ensure the effective administration of bankruptcy cases. Preservation of the debtor's constitutional rights and facilitation of the statutory policies of the bankruptcy laws

> can be accomplished in this case by remanding this matter to the bankruptcy court for a determination as to whether the information withheld by the Debtor pursuant to her Fifth Amendment privilege has, in fact, precluded a fair and effective administration of the estate. If it has, on remand, the Debtor's refusal to testify may lead the bankruptcy court to dismiss without prejudice the Debtor's bankruptcy petition. However, such an action would be taken not to punish the Debtor but to balance the invocation of the privilege against the need for adequate disclosure to the Trustee and creditors. Such a result would not only be more fair to the Trustee and creditors, it would also facilitate the proceeding in that when the bankruptcy court eventually ruled on the discharge, it would do so with the benefit of the full mix of available information.[329]

The court then remanded the matter to the bankruptcy court to make a factual determination as to whether the debtor's refusal to testify had prevented the trustee from carrying out his statutory duties.[330]

Another possible negative consequence is the denial of the debtor's discharge.[331] The debtor may not be denied a discharge solely because he invokes the Fifth Amendment.[332] A debtor may be denied a

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327. *In re* Moses, 792 F. Supp. 529, 537-38 (E.D. Mich. 1992).

328. *See* 11 U.S.C. § 707(a) (1994), *amended by* 100 Stat. 3100; *id.* § 1112, *amended by* 100 Stat. 3102; *id.* § 1208, *repealed by* 100 Stat. 3121; *id.* § 1307, *amended by* 100 Stat. 3103, 100 Stat. 3114. The enumerated grounds for dismissal are not exhaustive. *See id.* § 102(3).

329. *In re* Moses, 792 F. Supp. 529, 538 (E.D. Mich 1992).

330. *Cf.* Mellon Bank v. Fekos (*In re* Fekos), 148 B.R. 10 (Bankr. W.D. Pa. 1992)(denying a creditor's motion to dismiss for failure to explain how the debtor's refusal to testify made it impossible for the bankruptcy estate to be administered).

331. One court has noted, correctly it would seem, that the denial of the debtor's discharge is in fact a more serious consequence than dismissal of the debtor's case. *See In re* Connelly, 59 B.R. 421, 447 (Bankr. N.D. Ill. 1986).

332. *See* 11 U.S.C. § 727(a)(6) (1994). *See also* Torcie v. Ruff (*In re* Grower's Packing Co., Inc.), 150 B.R. 82, 83 (Bankr. S.D. Fla. 1993)(finding that the debtor's use of his Fifth Amendment privilege should not be the sole basis for denial of discharge); *In re* Potter, 88 B.R. 843, 850 (Bankr. N.D. Ill. 1988)(holding that Con-

discharge, however, if after being granted immunity or being ordered to testify following a determination by the court that he improperly invoked the privilege against self-incrimination, he continues to refuse to testify.[333]

In addition, several of the grounds for denying a debtor a discharge involve matters about which a debtor might not wish to testify for fear of incriminating himself.[334] If the trustee or a creditor establishes a prima facie case, and the debtor chooses to remain silent, the court may draw an adverse inference from the debtor's silence and deny the debtor a discharge.

For example, a debtor can be denied a discharge for concealing, destroying, mutilating, falsifying, or failing to keep or preserve records from which the debtor's financial condition might be ascertained.[335] Thus, in *Chase Manhattan Bank, N.A. v. Frenville*,[336] the debtor was denied a discharge, not because he invoked the Fifth Amendment, but because by doing so he failed to rebut the plaintiff's allegations that, among other wrongful acts, he had destroyed or withheld records.

A debtor also can be denied a discharge for failing to explain satisfactorily a loss of assets.[337] This was the case in *In re Horridge*[338] and *In re Simmons*,[339] in which the debtors were denied discharges, again not because they invoked the Fifth Amendment, but because by remaining silent in the face of the plaintiffs' evidence of a significant loss of assets, they offered the court no explanation—much less a satisfactory explanation—of such loss.[340]

Finally, a debtor can be denied a discharge for transferring, removing, destroying, mutilating, or concealing property of the debtor or property of the estate, or permitting such property to be transferred, removed, destroyed, mutilated, or concealed; making a false oath or account; presenting or using a false claim; giving, offering, receiving, or attempting to obtain money, property, or advantage or a promise of money, property, or advantage; acting or forbearing to act; or for withholding from an officer of the estate entitled to possession of them any

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gress intended to protect against self-incrimination without a penalty in bankruptcy).

333. 11 U.S.C. § 727(a)(5)(B), (C) (1994). *See* Torcie v. Ruff (*In re* Grower's Packing Co., Inc.), 150 B.R. 82, 84 (Bankr. S.D. Fla. 1993).

334. *See* 11 U.S.C. § 727(a) (1994).

335. *Id.* § 727(a)(3).

336. 67 B.R. 858 (Bankr. D.N.J. 1986).

337. 11 U.S.C. § 727(a)(5) (1994).

338. 127 B.R. 798 (S.D. Tex. 1991).

339. 113 B.R. 741 (Bankr. M.D. Fla. 1990).

340. *But see In re* Potter, 88 B.R. 843, 850 (Bankr. N.D. Ill. 1988)(reading § 727(a)(5) and § 727(a)(6) together to require finding the valid assertion of the Fifth Amendment to be a "satisfactory explanation" under § 727(a)(5)).

books, documents, records, or papers relating to the debtor's property of financial affairs.[341] Under the rationale of *Frenville*, *Horridge*, *Simmons*, and similar cases, a debtor who chooses to invoke her Fifth Amendment privilege against self-incrimination rather than testify in rebuttal of a trustee's or a creditor's evidence of any such conduct, could be denied a discharge.

A third possible negative consequence of invoking the Fifth Amendment is the determination that a particular creditor's claim against the debtor is nondischargeable. As is the case with several of the grounds for denying a debtor a discharge, many of the grounds for finding a particular debt to be nondischargeable involve matters about which a debtor's testimony might prove to be self-incriminating.[342]

For example, a debt for money, property, services, or an extension, renewal, or refinancing of credit can be found to be nondischargeable to the extent it was obtained by false pretenses, a false representation, actual fraud, or a materially false written statement regarding the debtor's or an insider's financial condition.[343] In *Chase Manhattan Bank, N.A. v. Frenville*,[344] three creditors pled essentially all these grounds in their complaint to determine the dischargeability of their claims against the debtors. After the debtor invoked the Fifth Amendment, the creditors moved for summary judgment, filing "extensive affidavits by corporate officers setting forth a scheme of fraud and deception in support of each of the allegations of the complaint."[345] While the bankruptcy court chose not to review the details of the allegations in its opinion, it found that the creditors had established a prima facie case for nondischargeability. Drawing from the debtors' refusal to testify an inference that they were unable to deny the creditors' allegations, the court then held that the creditors' claims were nondischargeable.

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341. 11 U.S.C. § 727(a)(2), (a)(4) (1994).

342. *See id.* § 523(a). The absence in § 523(a) of a provision comparable to that found in § 727(a)(6) has led some bankruptcy courts to conclude that a debtor cannot raise the Fifth Amendment in response to a nondischargeability complaint. *See, e.g.*, Charter Fed. Sav. Ass'n v. Rezak (*In re* Lederman), 140 B.R. 49, 53 (Bankr. E.D.N.Y. 1992)("Congress specifically preserved a debtor's rights to raise the privilege against self-incrimination, absent a grant of immunity, with respect to oral examination and testimony without prejudice to the right to a discharge. The lack of a similar provision in § 523 leads to the inescapable conclusion that none was intended."); Chase Manhattan Bank, N.A. v. Frenville, 67 B.R. 858, 862 (Bankr. D.N.J. 1986)("[I]t is clear that Congress did not authorize the use of the privilege with respect to a claim concerning the dischargeability of a specific debt. Nowhere in 11 U.S.C. § 523 does the privilege arise.").

343. 11 U.S.C. § 523(a)(2) (1994).

344. 67 B.R. 858 (Bankr. D.N.J. 1986).

345. *Id.* at 859.

A debt for fiduciary fraud or defalcation, embezzlement, or larceny can also be found to be nondischargeable.[346] In *Erie Materials, Inc. v. Oot (In re Oot)*,[347] the plaintiff, a materialman, supplied materials for a project on which the debtor was the general contractor. The plaintiff alleged that the debtor's failure to pay for the materials amounted to fiduciary fraud or defalcation and that its claim against the debtor should therefore be excepted from the debtor's discharge. After first determining that under New York law payments received by a general contractor for a project are held in trust for the benefit of a materialman who supplies materials for the project, the bankruptcy court drew from the debtor's silence following his invocation of the Fifth Amendment the inference that the payments he had received but not paid over to the plaintiff had been wrongfully diverted. The court then found that this constituted a defalcation and held that the plaintiff's claim was nondischargeable.

A debt for willful and malicious injury to another or to another's property can also be found to be nondischargeable.[348] In *General Motors Acceptance Corp. v. Bartlett (In re Bartlett)*,[349] a creditor sought a determination of nondischargeability of its claim, which arose out of a "floor plan" financing arrangement between the creditor and the debtor's car dealership. The creditor alleged that the debtor caused the dealership to retain sale proceeds that should have been paid over to the creditor and used funds intended for the purchase of new cars for other purposes. The creditor argued this amounted to, among other things, a willful and malicious injury. In response, the debtor invoked the Fifth Amendment and refused to comply with the creditor's discovery requests. After the bankruptcy court denied the creditor's motion for summary judgment, the creditor filed a motion to compel, which the court granted.[350] When the debtor persisted in refusing to comply with the discovery requests, the creditor brought a motion for default judgment, which the court also granted.

> [A] voluntary Chapter 7 debtor is required to produce documents necessary to the trial of an objection to the discharge of a particular debt . . ., notwithstanding any incidental incriminating effect of such production, if said debtor wishes to pursue and obtain the discharge of the debt in question by virtue of his bankruptcy filing. The debtor was present at the hearing on the motion for entry of default judgment. Through counsel, the debtor stated that if he has to produce the documents to avoid having default judgment entered against him he still will refuse to produce by invoking his Fifth Amendment privilege. Accordingly, and since no purpose would be served by any further delay in

346. 11 U.S.C. § 523(a)(4) (1994).

347. 112 B.R. 497 (Bankr. N.D.N.Y. 1989).

348. 11 U.S.C. § 523(a)(6) (1994).

349. 162 B.R. 73 (Bankr. D.N.H. 1993).

350. *See* General Motors Acceptance Corp. v. Bartlett (*In re* Bartlett), 154 B.R. 827 (Bankr. D.N.H. 1993).

> resolving this adversary proceeding, . . . a default judgment [will be entered].[351]

Finally, a debt arising out of a death or personal injury caused by a debtor's unlawful operation of a motor vehicle while under the influence of alcohol, drugs, or other substance also can be found to be nondischargeable.[352] Given the holdings in *Frenville*, *Oot*, *Bartlett*, and other like cases, if a debtor invokes the Fifth Amendment and leaves unrebutted a creditor's prima facie case, it seems reasonable to assume that a bankruptcy court would except such a debt from the debtor's discharge.

Another possible negative consequence of a valid claim of privilege is the denial of confirmation of a debtor's plan of reorganization. In Chapters 11, 12, and 13, the bankruptcy court may confirm a debtor's plan only if a number of requirements are met.[353] One such requirement is that the plan be proposed in good faith.[354]

In *In re McCormick*,[355] the bankruptcy court denied confirmation of the debtor's Chapter 11 plan, finding that the debtor's refusal on Fifth Amendment grounds to testify at a deposition in a nondischargeability action demonstrated that his plan had not been filed in good faith. The district court affirmed without opinion. On appeal from that decision, however, the circuit court found that the totality of the circumstances in the case negated any inference of bad faith that might be drawn from the debtor's invocation of the Fifth Amendment. The debtor had complied with all financial and disclosure requirements; he had timely filed his schedules and statement of financial affairs; he had testified at his § 341 meeting of creditors; the bankruptcy court had approved his disclosure statement; and the necessary number of creditors had voted in favor of his plan. Under the circumstances, the court held that the debtor's refusal to testify, standing alone, was insufficient evidence of bad faith.

> The Bankruptcy Code does not dictate nor have we found any other court to have held that a bankruptcy court may deny confirmation of a reorganization plan solely because the debtor refused to testify on the basis of the privilege against self-incrimination in a related proceeding during the pendency of a Chapter 11 case . . . . As long as [the debtor's] failure to testify at the[creditor's] deposition did not impede the basic bankruptcy administration of his case, . . . assertion of his Fifth Amendment privilege alone cannot be the basis for denying confirmation of his plan.[356]

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351. General Motors Acceptance Corp. v. Bartlett (*In re* Bartlett), 162 B.R. 73, 79 (Bankr. D.N.H. 1993).

352. 11 U.S.C. § 523(a)(9) (1994).

353. *See id.* §§ 1129(a), 1225(a), 1325(a).

354. *Id.* §§ 1129(a)(3), 1225(a)(3), 1325(a)(3).

355. 49 F.3d 1524 (11th Cir. 1995).

356. *Id.* at 1526-27.

Nonetheless, the court specifically left open the possibility that a debtor's invocation of the Fifth Amendment might support a denial of confirmation.

> It may well be that the bankruptcy court may have denied [the debtor's] confirmation for reasons additional to his refusal to testify in the [creditor's] deposition, or that his refusal impeded the administration of the Chapter 11 plan in a way not disclosed by this record. If so, that issue may be addressed on remand.[357]

Yet another possible negative consequence is the striking of evidence offered by the individual invoking the Fifth Amendment. As noted by the Fourth Circuit Court of Appeals in *In re Edmond*,[358] courts have struck an individual's testimony for invoking the Fifth Amendment and refusing to testify on cross-examination.[359] In *Edmond*, however, the evidence at issue was an affidavit offered by the debtor in support of his motion for summary judgment in a nondischargeability action brought against him. The plaintiff objected to the affidavit, alleging that by asserting the privilege against self-incrimination throughout the discovery process, the debtor had prevented the plaintiff from responding appropriately to the motion. The bankruptcy court agreed with the plaintiff, struck the debtor's affidavit, and denied the motion for summary judgment. On appeal, both the district court and the circuit court affirmed the bankruptcy court's decision to strike the affidavit. "By selectively asserting his Fifth Amendment privilege, [the debtor] attempted to insure that his unquestioned, unverified affidavit would be the only version. But the Fifth Amendment privilege cannot be invoked as a shield to oppose depositions while discarding it for the limited purpose of making statements to support a summary judgment motion."[360]

With few exceptions, the foregoing negative consequences have been suffered by individuals who properly invoked the privilege against self-incrimination. Individuals who improperly invoke the Fifth Amendment are also subject to negative consequences. For example, an individual may be held in contempt if she refuses to testify after being ordered to do so by the bankruptcy court.[361] In addition,

357. *Id.* at 1527.

358. 934 F.2d 1304 (4th Cir. 1991).

359. *See, e.g.*, Lawson v. Murray, 837 F.2d 653 (4th Cir. 1988)(striking direct testimony); United States v. Baker, 721 F.2d 647 (8th Cir. 1983)(disregarding direct testimony); United States v. Sack, 118 F.R.D. 500 (D. Neb. 1987)(holding that a witness must choose between asserting the Fifth Amendment and losing, or answering questions and risking a possible grand jury investigation).

360. *In re* Edmond, 934 F.2d 1304, 1308 (4th Cir. 1991). *See also* United States v. Parcels of Land, 903 F.2d 36, 43 (1st Cir. 1990). "Selective assertion" of the privilege may also raise a question of waiver.

361. *See* FED. R. BANKR. P. 9020. *See also* Shillitani v. United States, 384 U.S. 364, 370 (1966)("[C]ourts have inherent power to enforce compliance with their lawful orders through civil contempt."); *In re* Hulon, 92 B.R. 670, 675 (Bankr. N.D. Tex.

while an individual should not be held in contempt for refusing to answer questions following a valid assertion of the privilege against self-incrimination,[362] her continued silence after she is granted immunity may result in that sanction.

> The statute and the legislative history indicate that a debtor may be denied a discharge as a result of his failure to testify only when he continues to refuse to testify after a grant of immunity. It does not indicate that denial of the debtor's discharge is the exclusive penalty for failure to testify despite immunity. Furthermore, if the denial of discharge were the only penalty for refusing to testify, then a witness other than the debtor granted immunity under section 344 would have no incentive to testify. Obviously, this is not what Congress intended by section 727(a)(6)(B).[363]

If the court determines, for whatever reason, that an individual's conduct in refusing to testify does not amount to contempt, it still may impose other sanctions. For example, in *In re Hulon*,[364] the bankruptcy court did not find it was appropriate to hold the debtor in contempt for refusing to testify at a Rule 2004 examination ordered by the court.

> [T]he order [requiring the debtor to submit to the Rule 2004 examination] . . . was agreed to by the attorney then representing the debtor. Apparently, the criminal attorney representing the debtor would have objected to the examination and the court would have had a contested hearing to determine the appropriateness of the order. The court determines that the debtor's conduct does not constitute contempt in the circumstances of this case.[365]

The court nevertheless ordered the debtor to pay the trustee $1350, representing the fees and expenses he had incurred in connection with the Rule 2004 examination.

Finally, an individual who improperly invokes the Fifth Amendment in connection with a request for discovery may be sanctioned in the manner provided for a failure to comply with an order compelling discovery.[366] A bankruptcy court may sanction such a failure by considering designated facts to be established for the purposes of the underlying adversary proceeding; refusing to allow opposition to, or

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1988)("The court has the power, under 11 U.S.C. § 105 and Bankruptcy Rule 9020, to hear and determine a request for contempt emanating from the violation of one of its orders in a core proceeding.").

362. *In re* Jacques, 115 B.R. 272, 273-74 (D. Nev. 1990).

363. Martin-Trigona v. Belford (*In re* Martin-Trigona), 732 F.2d 170, 173-74 (2d Cir. 1984)(footnotes omitted).

364. 92 B.R. 670 (Bankr. N.D. Tex. 1988).

365. *Id.* at 676.

366. *See* Marine Midland Bank, N.A. v. Endres (*In re* Endres), 103 B.R. 49 (Bankr. N.D.N.Y. 1989)(declining to enter a default judgment against a debtor invoking the Fifth Amendment because to do so would be "disproportionate to the failure . . . given the lack of proof on willfulness, bad faith, history of dilatory conduct or prejudice to the plaintiff, the availability of lesser sanctions and the constitutional stature of the privilege asserted," but staying further proceedings in the underlying adversary proceeding pending the debtor's compliance with the court's discovery order).

support of, designated claims or defenses; prohibiting the introduction of designated matters into evidence; striking pleadings or portions of pleadings; staying further proceedings; dismissing the action or part of the action; entering default judgment; and awarding attorney's fees and expenses.[367]

In light of the myriad potential consequences of invoking the privilege against self-incrimination, an individual involved in parallel bankruptcy and criminal proceedings obviously faces some difficult decisions. The burden placed on such an individual may be reduced or eliminated if the bankruptcy proceeding is stayed pending the outcome of the criminal proceeding. The limited situations in which this may be appropriate are discussed below.

X. STAY OF BANKRUPTCY PROCEEDINGS

It is generally accepted that a bankruptcy court cannot enjoin a federal district court from trying a criminal case against a debtor.[368] In what appears to be the only published decision involving a bankruptcy court's attempt to do so, the bankruptcy court's decision was rapidly reversed on appeal.[369] Consequently, the question of whether a threat of criminal prosecution warrants the imposition of a stay to protect the debtor's Fifth Amendment privilege against self-incrimination is answered in the context of a stay of a bankruptcy proceeding.[370]

A complete stay of all bankruptcy proceedings pending the outcome of a related criminal case is an extraordinary remedy.[371] The propriety of issuing such a stay has been addressed by a number of bankruptcy courts. In *In re Hale*,[372] the Eighth Circuit Court of Appeals concluded that no authority supported the argument that a "bankruptcy court is compelled to grant a stay of proceedings, when [a debtor's] testimony constitutes an election between protecting civil interests in a bankruptcy proceeding and safeguarding [constitutional]

367. *See* FED. R. BANKR. P. 7037 (applying FED. R. CIV. P. 37 in adversary proceedings). The list of possible sanctions in Rule 37 is not exhaustive. The court is permitted to enter any order it deems just. *See* FED. R. CIV. P. 37(b)(2).

368. *See* Lower Brule Constr. Co. v. Sheesley's Plumbing & Heating Co., Inc., 84 B.R. 638 (D.S.D. 1988)(holding that a bankruptcy court cannot enjoin a district court). *But see In re* Lion Capital Group, 44 B.R. 690 (Bankr. S.D.N.Y. 1984)(staying civil actions brought in district court).

369. United States v. Air Fla. Inc., 48 B.R. 749 (S.D. Fla. 1984).

370. The question of whether a bankruptcy court may stay state court criminal proceedings is not discussed in this Article. For further reading on this issue, see Craig Peyton Gaumer, *Curbing an Expropriation of Power: The Argument Against Allowing Bankruptcy Courts to Enjoin State Criminal Proceedings*, 16 AM. BANKR. INST. J. 12 (1997).

371. *In re* Piperi, 137 B.R. 644, 646-47 (Bankr. S.D. Tex. 1991)(citing Weil v. Markowitz, 829 F.2d 166, 174 (D.C. Cir. 1987).

372. 980 F.2d 1176 (8th Cir. 1992).

rights in a criminal action."[373] Thus, it is left to the discretion of the bankruptcy court to decide whether the party requesting a stay has met its burden of showing that it is entitled to injunctive relief.[374] Some courts appear reluctant to grant such a stay if the debtor has not been indicted and the United States is not a party to the bankruptcy proceeding.[375]

Most motions to stay bankruptcy proceedings are filed by the debtor. In *In re Ahead By A Length, Inc.*,[376] however, an involuntary Chapter 7 case, the United States requested the stay. In that case, the Chapter 7 trustee filed an adversary proceeding to avoid certain prepetition fraudulent transfers that allegedly were part of a conspiracy between three "businessmen" to deprive the debtor of property. Prior to the filing of that adversary proceeding, the U.S. Attorney began a criminal investigation into the activities of Irwin Feiner, one of the conspirators, which ultimately led to his entering into a plea agreement that called for his "continued cooperation with the Internal Revenue Service, Federal Bureau of Investigation and the U.S. Attorney."[377] Feiner was then convicted of "conspiracy to defraud the United States of corporate income tax, personal income tax evasion and wire fraud."[378]

The remaining conspirators were subsequently indicted for aiding and abetting tax evasion and other federal offenses. When they attempted to depose Feiner in the trustee's adversary proceeding, "he pleaded his Fifth Amendment privilege against [self-incrimination] in response to virtually every question."[379] The two coconspirators then filed a motion to compel. In response, the U.S. Attorney filed a motion to intervene and a request for "a protective order staying discovery pending the disposition of the related criminal proceedings."[380] The United States was concerned that "the upshot of compelling Feiner's testimony would be the granting of insight to the criminal defendants into the government's case against them . . . [contrary to] the rules governing discovery in a criminal case."[381]

In considering the U.S. Attorney's motion, the bankruptcy court, citing Justice Cardozo's opinion in *Landis v. North American Co.*,[382] first determined that it had the power to stay discovery regardless of

373. *Id.* at 1179.
374. *See, e.g., In re* Good, 131 B.R. 121, 127 (Bankr. N.D. Iowa 1990); *In re* Marceca, 131 B.R. 774 (Bankr. S.D.N.Y. 1991).
375. *See, e.g., In re* Tower Metal Alloy Co., 188 B.R. 954, 957 (Bankr. S.D. Ohio 1995).
376. 78 B.R. 708 (Bankr. S.D.N.Y. 1987).
377. *Id.* at 709.
378. *Id.*
379. *Id.*
380. *Id.*
381. *Id.* at 710.
382. 299 U.S. 248 (1936).

whether the issue was raised by a party or by the court on its own motion.

> [T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.[383]

To do this, the court employed a five-part test and considered the following factors: (1) the interest of the plaintiff in continuing expeditiously with the litigation, and the prejudice to the plaintiff due to any delay caused by the stay; (2) the burden the stay would impose on the defendants; (3) the efficient use of judicial resources, and convenience to the court; (4) the interests of other persons who were not parties to the litigation; and (5) the interest of the public in both the pending criminal and civil litigation.[384]

Taking each of these factors into account, the court in *Ahead By A Length* concluded that issuing a stay would be appropriate. First, the court held that allowing the criminal case to conclude before continuing with the adversary proceeding actually would make the plaintiff's pursuit of her case easier. Second, the defendants would not be harmed because the court stayed all civil proceedings to allow the defendants to complete discovery at an appropriate time. Third, granting the stay and allowing the criminal case to conclude first would be a great benefit to the bankruptcy court's resources, "for many of the issues here will be disposed of in that proceeding whereas if [the adversary proceeding] proceeded first . . . much pertinent information would probably be withheld."[385] Fourth, the U.S. Attorney had a significant interest in seeing the adversary proceeding stayed to ensure that the defendants in the criminal case did not discover more of the government's case against them than they were entitled to under the Federal Rules of Criminal Procedure.[386] Finally, the public interest in having the criminal case go forward outweighed any such interest in the ad-

383. *In re* Ahead By A Length, Inc., 78 B.R. 708, 710 (Bankr. S.D.N.Y. 1987)(citations omitted).

384. *Id.* at 713 (citing White v. Mapco Gas Prods., 116 F.R.D. 498 (E.D. Ark. 1987); Arden Way Assoc. v. Boesky, 660 F. Supp. 1494, 1497 (S.D.N.Y. 1987). *See also* Fed. Sav. & Loan Ins. Corp. v. Molinaro, 889 F.2d 899, 902-03 (9th Cir. 1989)(quoting Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc., 87 F.R.D. 53, 56 (E.D. Pa. 1980)); *In re* Tower Metal Alloy Co., 188 B.R. 954, 956 (Bankr. S.D. Ohio 1995)(noting the foregoing factors, but choosing not to apply them "in a formalistic, mechanical fashion").

385. *In re* Ahead By A Length, Inc., 78 B.R. 708, 713 (Bankr. S.D.N.Y. 1987).

386. *Id. See also id.* at 710-13 (discussing in detail the propriety of using civil discovery to avoid the restrictions on criminal discovery).

versary proceeding. The court then stayed the bankruptcy proceeding for six months pending disposition of the criminal case.[387]

In *In re Ross*,[388] the bankruptcy court applied the same factors, but reached a different result. In that case, the Internal Revenue Service (IRS) asked the court to stay indefinitely a nondischargeability action brought against it by the debtors, pending the completion of a criminal investigation involving the debtors. The court began its analysis with the third factor, noting that

> the IRS has requested a stay until both the criminal investigation and any criminal proceedings are completed. The IRS has not estimated how much time this would involve, and has not limited its request for a stay. Such an indefinite request for a stay puts the IRS, and not this Court, in control of the case. It detrimentally affects the Court's ability to control its docket. It indefinitely deprives the debtors of the "fresh start" central to bankruptcy policy, without even requiring the IRS to appear in court or show a prima facie case of nondischargeability. Given that the amount of any claim the IRS may possess against the debtors is also apparently undetermined, a stay could deprive creditors of the estate of a remedy for an extensive period of time. . . .
>
> Judicial economy is also relevant to this factor. If this proceeding is stayed and debtors are convicted in a subsequent criminal proceeding, the debtors may be collaterally estopped with regard to those matters determined in the criminal proceeding. . . . The result might be a need for only one trial (the criminal case), instead of two trials regarding the same matter. Where the criminal proceedings have not even culminated in an indictment, however, such judicial economy is speculative, and entitled to less weight.[389]

Returning to the first factor, the court then observed that staying the adversary proceeding in the manner requested by the IRS would burden the debtors by suspending indefinitely their right to a determination of the extent to which the IRS's claim was nondischargeable and the debtor's right to a "fresh start."[390] With respect to the second factor, the court recognized that allowing the adversary proceeding to go forward would burden the IRS, both because the debtors might be able to discover information regarding the IRS's case that they would not be able to discover in a criminal case, and because the debtors might be able to limit the IRS's ability to discover information regarding their case by asserting the Fifth Amendment. It discounted this burden, however, because "[w]eighing against this impact is its completely hypothetical nature at this point; so far as the record indicates, neither side has sought discovery."[391]

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387. Apparently overlooked by both the parties and the court in *In re Ahead By A Length* was that Feiner did not appear to have had a very strong Fifth Amendment argument. Having already pled guilty to the offenses for which his alleged coconspirators were facing both civil and criminal liability, the likelihood that his testimony would have incriminated him seems remote. *See In re* Litton, 74 B.R. 557, 559 (Bankr. C.D. Ill. 1987).

388. 162 B.R. 860 (Bankr. D. Idaho 1993).

389. *Id.* at 861-62 (citations omitted).

390. *Id.* at 861.

391. *Id.* at 862.

In analyzing the fourth factor, the court looked to the interests of the debtors' other creditors, who could not be paid until the amount of the IRS's claim was determined. The court found this to be a substantial burden. Finally, with respect to the fifth factor, the court acknowledged that ordinarily the public interest in law enforcement exceeds any private interest in pursuing a civil action. But, the court noted that "[t]he public interest in a bankruptcy proceeding is not insubstantial."[392] The court went on to say that "delay in determining the IRS's claim will not merely adversely impact on the debtors; it will prevent any recovery to all of the creditors of the debtor."[393]

Not surprisingly, the court then denied the IRS's motion for a stay. In doing so, however, the court indicated that protective orders under Federal Rule of Civil Procedure 26(c) and Federal Rule of Bankruptcy Procedure 7026 would be liberally granted. Further, if either party could not complete discovery, whether because of such a protective order or the debtors' invocation of the Fifth Amendment, the court would entertain a renewed motion for a stay.[394]

While a bankruptcy court may be reluctant to stay an entire bankruptcy proceeding until a parallel criminal proceeding is resolved, many bankruptcy judges may be willing to exercise their inherent power to manage their docket in such a way as to afford the party requesting the stay some limited period of time to try to resolve or conclude the criminal proceeding. Given such an opportunity, the reluctant witness may wish to consider whether a grant of immunity is a possible means of resolving the impasse.

XI. IMMUNITY

A proper invocation of the Fifth Amendment privilege against self-incrimination does not in every instance guarantee the right to remain silent. An individual may be granted immunity from prosecution pursuant to 18 U.S.C. §§ 6001 to 6005, which apply to bankruptcy cases, both by their own terms and by their incorporation in 11 U.S.C. § 344. Once granted immunity, the individual may be compelled to testify regarding matters that would have been incriminating because "if the criminality has already been taken away, the [Fifth] Amendment ceases to apply."[395]

If the U.S. Attorney determines that the testimony of an individual who has invoked, or is likely to invoke, the Fifth Amendment is necessary to the public interest, she may ask the district court for an order

392. *Id.*
393. *Id.*
394. *Id.* at 863.
395. Hale v. Henkel, 201 U.S. 43, 67 (1906). *See also* Kastigar v. United States, 406 U.S. 441, 448 (1972); Ullmann v. United States, 350 U.S. 422, 431 (1956); Brown v. Walker, 161 U.S. 591 (1896).

requiring the individual to testify.[396] Upon such request, the district court "shall issue . . . an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination."[397] In that event, however, the government may not use the testimony or any information directly or indirectly derived from it against the individual in any criminal case other than a prosecution for perjury, giving a false statement, or other failure to comply with the order.[398]

The immunity provided by such an order is "use immunity," not "transactional immunity."[399] The question of whether this more limited form of immunity sufficiently protects an individual's Fifth Amendment rights was decided by the Supreme Court in *Kastigar v. United States*.[400] The Court held that the practice of compelling testimony after a grant of use immunity is constitutional.[401] Writing for the majority, Justice Powell explained that "[t]ransactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege."[402] Immunity, to Powell, was not synonymous with amnesty.[403] The Fifth Amendment, he noted, protects a person from being compelled to testify against himself—to keep his own words from being used against him. Justice Powell reasoned that use immunity was sufficient to achieve this goal.

> Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the same witness.[404]

If the government prosecutes a person who has been granted immunity, the prosecution bears the burden of establishing that the evidence against the witness came from an "independent, legitimate source."[405]

The Department of Justice has specific guidelines governing requests for a court order compelling the testimony of, or the production

396. 18 U.S.C. § 6003(b) (1994).
397. *Id.* § 6003(a).
398. *Id.* § 6002.
399. *See* S. REP. No. 95-989 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5829; H.R. REP. No. 95-595 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6288-89.
400. 406 U.S. 441 (1972). The *Kastigar* decision was a 5-2 decision, with Justices Brennan and Rehnquist taking no part.
401. Separate dissents were filed by Justice Douglas, *id.* at 462-67, and Justice Marshall, *id.* at 467-71.
402. *Id.* at 453.
403. *Id.* at 462.
404. *Id.* at 453.
405. *Id.* at 460 (quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 n.18 (1964)).

of documents by, a person who has asserted a valid Fifth Amendment privilege use of immunity.[406] An attorney for the United States must consider all relevant factors in assessing whether a grant of immunity is in the public interest, including, but not limited to the following:

1. the importance of the investigation or prosecution to effective enforcement of the criminal laws;[407]
2. the value of the testimony or information to the investigation or prosecution;[408]
3. the likelihood of prompt and full compliance with a compulsion order, and the effectiveness of available sanctions if there is no such compliance;[409]
4. the person's relative culpability in connection with the offense being investigated or prosecuted, and the person's history of criminal activity;[410]
5. the possibility of successfully prosecuting the person prior to compelling the testimony or production of information;[411]
6. the likelihood of adverse collateral consequences to the person if testimony or production of information is compelled;[412] and
7. whether the witness for whom immunity is being considered is a close relative of the person against whom the testimony is being sought.[413]

After considering each of the foregoing factors and any others that are relevant, an Assistant U.S. Attorney must first seek the U.S. Attorney's permission to refer the matter to an Assistant Attorney General (AAG),[414] and then must obtain the approval of the AAG for the Criminal Division or the AAG for the division of the Department of Justice accountable for the case.[415] Finally, if an AAG other than the AAG for the Criminal Division approves the request, he must also obtain the approval of the AAG for the Criminal Division.[416] The Assistant U.S. Attorney may then file the necessary motion in the district court.[417]

In a bankruptcy case, if a debtor refuses to testify after a grant of immunity, the court can deny the debtor a discharge.[418] In addition,

406. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL § 9-23.110 to -310 (1992).

407. *Id.* § 9-23.210(A).

408. *Id.* § 9-23.210(B).

409. *Id.* § 9-23.210(C).

410. *Id.* § 9-23.210(D).

411. *Id.* §§ 9-23.210(E), 9-23.212.

412. *Id.* § 9-23.210(F).

413. In this situation, immunity will not be sought unless "specific justification" exists. *Id.* § 9-23.211.

414. *Id.* § 9-23.110. An attorney assigned to a Department of Justice litigation division must follow the procedure outlined in *id.* § 9-23.120.

415. *Id.* § 9-23.100. On the civil side, the authority to initially approve such requests has been given to the AAG in charge of the Civil Rights, Antitrust, Land and Natural Resources, and Tax Divisions. *Id.* § 9-23.130.

416. *Id.* § 9-23.130.

417. *Id.* § 9-23.310.

418. 11 U.S.C. § 727(a)(6)(B) (1994).

as discussed above, a debtor or a nondebtor witness can be held in contempt of court under such circumstances.[419]

XII. CONCLUSION

Participants in the bankruptcy process who are hesitant to make a full and complete disclosure of their financial affairs may be confronted with many difficult choices. An uninformed or ill-advised decision can have serious consequences, including the loss of the protection afforded by the Fifth Amendment and the denial of bankruptcy relief. An understanding of the concepts discussed above, including invocation, waiver, adverse inferences, other negative consequences, and immunity, should assist bankruptcy practitioners in counseling their clients when they are confronted with these difficult choices.

419. Martin-Trigona v. Belford (*In re* Martin-Trigona), 732 F.2d 170, 173-74 (2d Cir. 1984).