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It is Possible to Incriminate Yourself in the United States Bankruptcy Courts

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INTRODUCTION

The Fifth Amendment of the United States Constitution's Self Incrimination Clause provides that, "[n]o person shall . . . be compelled in any criminal case to be a witness against himself. . . ."[1] This right protects an individual from "answer[ing] official questions put to him in any [] proceeding . . . where the answers might incriminate him in future criminal proceedings."[2] While the drafters of the Constitution only included language related to criminal cases, the Supreme Court has extended the privilege to civil proceedings, including bankruptcy cases.[3] However, this privilege is not absolute, and can be waived by the person seeking to assert it.[4] A waiver can occur in two ways. First, by failing to assert the privilege in a timely fashion.[5] Second, by consenting to provide the privileged information.[6]

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[1] U.S. CONST. amend V.
[2] Leftkowitz v. Turley, 414 U.S. 70, 77 (1973); *see also* Baxter v. Palmigiano, 425 U.S. 308, 316 (1976).
[3] *See* McCarthy v. Arndstein, 266 U.S. 34, 42 (1924); *see also In re* Hulon, 92 B.R. 670, 673 (Bankr. N.D. Tex. R. 1988); Horwitz v. Sheldon (*In re* Donald Sheldon & Co.), 193 B.R. 152, 162 (Bankr. S.D.N.Y. 1996).
[4] *See* Maness v. Meyers, 419 U.S. 449, 466 (1975).
[5] *See* Yakus v. United States, 321 U.S. 414, 444 (1944).
[6] *See* SEC v. Oxford Capital Secur., Inc., 794 F. Supp. 104, 108 (S.D.N.Y 1992).

This memorandum explores the circumstances surrounding Fifth Amendment waivers in United States courts, such as the bankruptcy courts. Part I examines how long a person has to assert their Fifth Amendment right before it is considered waived. Part II describes what actions an individual can take within that timeframe that would affirmatively waive the privilege. If either form of waiver occurs, a witness will be required to turn over incriminating information.

I. What Constitutes a "Timely Manner" in Regard to Fifth Amendment Waivers?

The Fifth Amendment provides "purely a personal privilege of the witness."[7] The Amendment does not protect a witness from testifying voluntarily.[8] Consequently, a defendant "must claim it or he will not be considered to have been 'compelled'" to testify under the language of the Amendment.[9] The exact amount of time a person has to assert their Fifth Amendment privilege after being asked to testify has not been set. Instead, the Supreme Court has recognized three potential instances where the waiver might occur that supplant the need for an absolute timeframe. The first occurs when the Fifth Amendment assertion is merely an afterthought. The second is when the asserter has been given immunity for the crimes. The third is whether the waiver has been statutorily applied. However, these occasions are also buttressed by a "good-faith" assessment, which seeks to preserve the rights of those who may have inadvertently waived for good reason.

[7] Rogers v. United States, 340 U.S. 367, 371 (1951) (citing Hale v. Henkel, 201 U.S. 43, 69 (1906)).
[8] United States v. Monia, 317 U.S. 424, 427 (1943).
[9] *Id.*

A) *Invoking the Fifth Amendment as a Back-Up Plan May Yield a Waiver.*

The Supreme Court first recognized the possibility of waiving the Fifth Amendment privilege as an afterthought in *United States ex rel. Vajtauer v. Commissioner of Immigration*.[10] In *Vajtauer*, the refusal to testify was originally based upon a "supposed right of the witness not to be called upon to testify until all the evidence in support of the warrant was presented. . . ."[11] However, because the witness refused to testify, his silence was used against him in a deportation claim. On appeal, the Court held that since "he did not assert his privilege or in any manner suggest that he withheld testimony because there was any ground for fear of self-incrimination," his assertion of the Fifth Amendment was evidently an afterthought.[12] Thus, his privilege was waived.[13] However, while finding a claim to be an afterthought creates a bright-line-rule applicable to all cases, it is hard to determine whether privilege is an afterthought outside of a case to case basis.

For example, in *Rogers v. United States* the Court held that the treasurer of the Communist Party of Denver had waived her Fifth Amendment Privilege when refusing to turn over the books and records of the party.[14] The treasurer declined to divulge, first out of courtesy for those in the Party, but later asserted her privilege before the presiding district court.[15] In that case, the Supreme Court reasoned that since she had "expressly placed her original declination to answer on an untenable ground . . . , [the] desire to protect others from punishment," she had waived her privilege.[16] Further, the Court upheld the waiver despite evidence that the Treasurer only asserted the privilege after hearing it come up in a prior case, suggesting that she did not

[10] 273 U.S. 103, 113 (1927).
[11] *Id.* at 111-12.
[12] *Id.* at 113.
[13] *Id.*
[14] 340 U.S. at 368.
[15] *Id.* at 368-69.
[16] *Id.* at 371.

know of its function.[17] Therefore, providing a prior untenable ground waives the privilege regardless of a person's knowledge that the privilege exists.

Additionally, failing to bring the attention of the court to the Fifth Amendment assertion, such as waiting to use it until the last possible second, waives the privilege.[18] This was the case in *Reid v. Wolf,* a chapter 7 bankruptcy case, where the United States Bankruptcy Court for the Northern District of Illinois, held a third party in default after that third party denied adhering to a motion to compel issued by the trustee in discovery.[19] The court noted that "the circumstances coloring [the third party's] invocation of the privilege [had] not changed in any material way" following a prior opportunity to assert the privilege.[20] In that instance, the court found this "eleventh hour invocation" was an attempt at "dilatorily engaging in procedural gamesmanship" in a similar way to providing untenable grounds.[21] Therefore, the defendant waived his privilege by failing to assert it at an earlier opportunity.

B) *Accepting Immunity Removes the Applicability of the Fifth Amendment.*

Waivers of the Fifth Amendment are also found through immunity. Because the Fifth Amendment only protects an individual from revealing statements that would subject them to criminal proceedings, "if the criminality has already been taken away, the Amendment ceases to apply."[22] This sort of waiver would occur, for example, when a person is compelled to testify about an act that they committed as a child, which would have been a criminal act had the statute of limitations not passed.[23]

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[17] *Id.* at 370 n. 4 ("I'm a very honest person and I'm not acquainted with the tricks of legal procedure, but I understand from the reading of these cases this morning that . . . I do have a right to refuse to answer. . . .").
[18] *See United States ex rel. Vajtauer*, 273 U.S. at 113.
[19] Reid v. Wolf (*In re* Wolf), Case No.14 B 27066, 2018 Bankr. LEXIS 1549 at *9 (Bankr. N.D. Ill. May 24, 2018).
[20] *Id.* at *11 (finding that the asserting party's lack of credibility throughout the trial negated any claims that he had become aware of potentially incriminating evidence after an original motion to compel).
[21] *See generally id.* at *14.
[22] *Hale*, 201 U.S. at 67.
[23] *See id.*

If the witness is unsure about whether the information has lost its incriminating value, they can ask the court whether the testimony would amount to incrimination prior to it being given.[24] Judicial oversight of the Fifth Amendment claim establishes that "the privilege may not be relied on and must be deemed waived if not in some manner fairly brought to the attention of the tribunal. . . ."[25] Ultimately, the protection of judicial oversight creates a "use-it-or-lose-it" situation for potential testifiers.

C) *Waivers of the Fifth Amendment Can be Imposed Through Statute.*

The final instance where timing bars the assertion of Fifth Amendment privilege is when a statute sets the time limit for objections. In *Davis v. Fendler*, a statutory time limit was discussed as set by the Federal Rules of Civil Procedure. In that case, a person who was compelled to interrogatories waived their privilege by not objecting within the time frame set by the Federal Rule of Civil Procedure 33.[26] Rule 33 states that objectors to an interrogatory "must serve [their] answers and any objections within 30 days after being served . . . ."[27] The *Fendler* Court held that procedural time limits "constitute[] a waiver of any objection. . . even of an objection that the information sought is privileged."[28]

Statutory waivers have similarly been recognized by bankruptcy courts. In *American Eagle Bank v. Friedman (In re Friedman*), the United States Bankruptcy Court for the Northern District of Illinois, found a statutory waiver of the Fifth Amendment privilege under Federal Rule of Civil Procedure 36.[29] While Rule 36 does not contain the untimely objections result

[24] *See United States ex rel. Vajtauer*, 273 U.S. at 113.
[25] *Id.*
[26] 650 F.2d 1154, 1160 (9th Cir. 1981).
[27] Fed. R. Civ. P. 33(b)(2) (allowing for a shorter or longer time to be stipulated by the court).
[28] *Fendler*, 650 F.2d at 1160 (citing United States v. 58.16 Acres of Land, 66 F.R.D. 570 (E.D. Ill. 1975)).
[29] 543 B.R. 833, 843 (Bankr. N. D. Ill. 2015).

found in Rule 33, courts have interpreted Rule 36 to have that condition.[30] In that case, the debtor failed to raise the Fifth Amendment within that thirty-day period, and thus waived his privilege.[31]

Lastly, any objection brought to the court within the bounds of the statutory limit should be plain enough for the court to understand why they are objectionable, leaving the court free to request additional information.[32] Judicial deference in this sense is in line with the oversight protections within waivers by immunity and help assure that the Fifth Amendment is being properly asserted.

D) *The Protections of Good Faith May Protect from Inadvertent Waivers.*

Despite the three aforementioned occasions, courts are generally lenient in finding waivers. This is because "such a 'testimonial waiver' is not to be lightly inferred, and the courts accordingly indulge every reasonable presumption against finding a testimonial waiver."[33] For these reasons, the Supreme Court in *Maness v. Meyers* held that a lawyer could not be held in contempt for advising his clients to claim Fifth Amendment privilege so long as there was a good faith reason behind it.[34] Therefore, if a person has a good-faith basis for the delay, the court may allow them to retain their Fifth Amendment privilege for some time.

II. What Constitutes a Waiver of the Fifth Amendment Privilege by Action?

Turning to the second source of waiver, consenting to provide the material that the privilege is being asserted for, the Second Circuit has suggested the use of a two-element test for oral testimonies.[35] First, if a witness begins to testify and then stops, the court should ask if the

[30] *Id.* (citations omitted) (noting that Rule 36 requires a respondent to answer or object within 30 days).
[31] *Id.* at 844.
[32] *Fendler*, 650 F.2d at 1160.
[33] Klein v. Harris, 667 F.2d 274, 287 (2d Cir. 1981) (citing Emspak v. United States, 349 U.S. 190, 198 (1955)); *see also* Smith v. United States, 337 U.S. 137, 150 (1949).
[34] 419 U.S. at 468.
[35] *See Klein v. Harris*, 667 F.2d at 287.

witness' prior statements create a "significant likelihood" that the finder of fact will be left with a distorted view of the truth.[36] Second, the court should assess if the witness had a reason to know that their prior statements would be a waiver of their privilege.[37] The test in *Klein* has been followed by the Eighth Circuit and lower trial and bankruptcy courts throughout the nation.[38] Applying this test provides lower courts with guidance on how to deal with the sensitive issue of waivers.

A) *Determining Whether the Truth Has Been Distorted.*

The first prong of the test, whether affirming the privilege would leave the fact finder with a distorted view of the truth, stems from the statements of Judge Learned Hand, who wrote, "the privilege is to suppress the truth, but that does not mean that it is a privilege to garble it. . . ."[39] The Supreme Court affirmed this in *Rogers*, holding that to provide otherwise would "open the way to distortion of facts by permitting a witness to select any stopping place in the testimony."[40] However, determining that a statement has left the facts distorted should only be inferred in the most compelling of circumstances.[41] For example, in *Klein* the court held that the first prong was satisfied when a witness recanted their willingness to testify after discussing the circumstances of a crime before the jury.[42] This left the jury with a distorted view of the truth, as they now had the basis of the situation, but not the conclusion.[43]

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[36] *Id.*
[37] *Id.*
[38] *See e.g.*, United States v. Singer, 785 F.2d 228, 241 (8th Cir. 1986); Thorne v. Loews Phila. Hotel, Inc., No. 15-3837, 2016 U.S. Dist. LEXIS 97832 at *12 (E.D. Penn. 2016); Allstate Ins. Co. v. Plambeck, No. 12-175, 2012 U.S. Dist. LEXIS 63649 at *14-15 (E.D. La 2012); *In re* Stoecker, 103 B.R. 182, 187 (N.D. Ill. 1989); Chevron U.S.A. Inc. v. M&M Petroleum Servs., No. 07-818, 2008 U.S. Dist. LEXIS 106045 at *7 (C.D. Cal. 2008).
[39] United States v. St. Pierre, 132 F.2d 837, 840 (2d Cir. 1942).
[40] 340 U.S. at 371.
[41] *Klein*, 667 F.2d at 288.
[42] *Id.* at 287-88.
[43] *See id.* at 288.

However, meeting the "distorted view of the truth" factor does not create a waiver if the case does not go to a finder of fact.[44] The "finder of fact" is determined by who assesses the provided facts to reach a conclusion.[45] For example, trustees in bankruptcy cases are finders of facts for depositions in discovery under Federal Rule of Civil Procedure 69 because the trustee is attempting to gather information to determine the assets of the debtor.[46] Further, if the final determination of a case is not made by a finder of fact, such as through settlement, this prong of the *Klein* test is found in favor of the privilege-asserting party.[47] However, if the case is re-opened then the waiver will stand.[48]

B) Determining Whether the Witness Has Knowledge of the Waiver.

The second prong of the test – whether the witness should have known that they had waived the privilege – provides a more objective calculation. Where the first prong only requires a court to determine if the fact finder would be left shorthanded, the second prong asks whether the witness' statements were both "testimonial" and "incriminating."[49] Testimonial means that the statements were voluntarily made under oath in the context of the same judicial proceeding.[50] In assessing whether a case is in the same proceeding, at least one court has suggested that in

[44] *In re* Donald Sheldon & Co., 193 B.R. at 163 (citing E.F. Hutton & Co. v. Jupiter Dev. Corp., 91 F.R.D. 110, 117 (S.D.N.Y. 1981)).
[45] *See Id.* at 164.
[46] *Id.*
[47] *See* Maguire & Co. Inc. v. Margolies (*In re* Candor Diamond Corp.), 42 B.R. 916, 920 (Bankr. S.D.N.Y 1984) (finding that a waiver would have occurred had the case not ended in a default judgement).
[48] *In re* Donald Sheldon & Co., 193 B.R. at 163 (discussing the circumstances of *In re* Candor Diamond Corp.).
[49] *Id.*
[50] *See* United States v. O'Henry's Film Works, Inc., 598 F.2d 313, 317-19 (2d. Cir. 1979) (statements must be voluntary); United States v. Housand, 550 F.2d 818, 821 n.3 (2d Cir. 1977) (statements must be in the same proceeding); *E. F. Hutton & Co.*, 91 F.R.D. at 114 (statements must be under oath).

bankruptcy cases testimony given at a section 341(a) meeting is not a waiver in later adversary proceedings.[51]

Further, incriminating means that they "did not merely deal with matters 'collateral' to the events surrounding commission of the crime."[52] For a court to find a waiver, the asserting party "must have already provided testimony that in and of itself is incriminating and that is specific to the topic where the questioner wants additional detail."[53] In *In re Yates*, a chapter 7 case, the United States Bankruptcy Court for the Southern District of California upheld the denial of the United States Trustee's motion to compel interrogatory responses against a debtor who asserted his Fifth Amendment privilege.[54] Prior to his case being previously discharged, the debtor, in a section 341(a) hearing, had answered "no" to the question "do you now or have you had in the past, any interests in offshore accounts . . . ?"[55] After discharge, the trustee came into possession of evidence that the debtor did have offshore accounts and determined that the discharge should be reconsidered.[56] The trustee issued interrogatories asking about offshore accounts, to which the debtor asserted his Fifth Amendment Privilege.[57] The court found that the previous statements did not cause a waiver because there is nothing but circumstantial evidence to suggest that they are untrue.[58] Therefore, the burden of showing a waiver falls to the party demanding the testimony.[59]

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[51] *See* Krasney v. Nam (*In re* Nam), 245 B.R. 216, 233 (Bankr. E.D. Pa. 2000)*; see also In re* Yates, No. 04-05619, 2008 Bankr. LEXIS 4406 at *26 (Bankr. S.D. Cal. 2008) (stating that testimony requested through interrogatories are a continuation of the 341(a) meeting's testimony for purposes of finding waiver in either part of the trial).
[52] Klein, 667 F.2d at 288.
[53] *In re* Yates, 2008 Bankr. LEXIS at *28.
[54] *See id.* at *42.
[55] *Id.* at *2.
[56] *Id.* at *6.
[57] *Id.* at *9.
[58] *Id.* at *34-35 (stating that the first prong of *Klein* also fails if there is no past incriminating statement, regardless of potential confusion to the finder of fact).
[59] *See generally id.* at *35 (stating that the trustee must have provided definitive evidence that the trustee voluntarily made a prior incriminating statement).

But when these factors are met, the witness "plainly has reason to know . . . that these statements may be interpreted as a waiver of his fifth amendment [sic.] privilege. . . ."[60] This second "consent" prong does not only apply to oral testimony, but also to documents requested under judicial proceedings. However, both factors come with some measure of discretion. Where some trial level courts have held documents to be waived by a temporal-waiver, such as a statutory waiver, other trial level courts have made exceptions for the assertion of Fifth Amendment privilege.[61] One example is in *In re Kave*,[62] where the Massachusetts District Court found that the failure to assert privilege was not fatal in cases where it did not cause undue delay, despite having agreed to produce the material already.[63]

On the contrary, where undue delay is caused, the waiver will be found.[64] In *SEC v. TelexFree*, Inc. the Massachusetts district courts found that a defendant's assertion of Fifth Amendment privilege was barred because they had already agreed to an order to provide accounting, had negotiated in creating the language of the order with the SEC, and had been represented by counsel.[65] As compared to *Day*, these two cases show the courts' reluctance to allow dilatory tactics despite a potentially valid assertion of the Fifth Amendment.

CONCLUSION

Waivers of the Fifth Amendment can produce monumental changes in litigation, requiring the potential disclosure of material that would otherwise remain confidential. Therefore, litigants should be conscious of when a waiver may occur. Also, the chance to waive

[60] *Klein*, 667 F.2d at 288.
[61] *See Day v. Boston Edison Co.*, 150 F.R.D. 16, 20 (D. Mass. 1993).
[62] 760 F.2d 343, 353 n. 22 (1st Cir. 1985).
[63] *Day*, 150 F.R.D. at 21.
[64] *In re* Wolf, No. 17-27066, 2018 Bankr. LEXIS 1549 at *14.
[65] 164 F. Supp. 3d 187, 192-93 (D. Mass. 2015).

through agreement to testify, whether the privileged material was known or not, should be recognized by litigants as they prepare for trial. While the presiding judge may have discretionary control over what is privileged, observant litigants may be able to withhold, or introduce, potentially incriminating evidence through diligent observation of consent. Finally, "dilatory tactics" or gamesmanship on either side results in waivers of the privilege, and possibly sanctions or contempt charges. The Fifth Amendment Privilege is there to protect individuals from divulging potentially harmful information, however, it is ultimately a privilege, and privileges can be lost.