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## To Plead or Not to Plead (the Fifth Amendment) in Civil Litigation - That is the Question

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**Criminal law and procedure can make even the most seasoned bankruptcy and restructuring lawyers uneasy. However, the Fifth Amendment privilege, in particular, does arise in civil matters from time to time. And there can be significant implications on discovery, motion practice, and trial.**

The Fifth Amendment privilege against self-incrimination "protects a person ... against being incriminated by his own compelled testimonial communications." That is, the Fifth Amendment proscribes (1) compulsion of a (2) testimonial communication that is (3) incriminating.

Often, we think of this privilege in the context of a criminal case or an episode of Law & Order. But it is equally applicable in civil litigation, including the discovery process. Notably, unlike in a criminal case, adverse inferences may be drawn in a civil case from a person's invocation of the privilege against self-incrimination.

Once the privilege is asserted by another party in a civil case, an evaluation of the assertion is critical. Generally, only a "person" can invoke the privilege. While any "person" may claim the privilege, a collective entity (e.g. partnership or corporation) or person called upon to appear in a representative capacity for a collective entity is not a "person" within the meaning of the Fifth Amendment. As such, a document custodian or corporate officer may be required to produce documents during the discovery process, even if those documents may implicate the custodian or officer.

Similarly, the privilege does not traditionally extend to the contents of business records. If however the act of producing the documents has a testimonial effect (e.g. communicating the existence or authenticity of documents, possession and control, etc.), the privilege may be invoked in response to a request for production.

Despite these nuisances, a blanket assertion of the Fifth Amendment privilege, regardless of the questions being asked, is improper. Each assertion of the privilege should be explored, because the Fifth Amendment privilege does not allow a party or non-party from wholesale refusing to any questions or produce any documents without specifically considering whether the information sought may actually raise a substantial and real hazard of self-incrimination. Understanding this framework, Fifth Amendment issues may arise within the context of adversary proceedings and other contested hearings.

**Practice pointer:** The assertion of the Fifth Amendment privilege in civil litigation presents a number of strategic opportunities during discovery and the dispositive motion and trial phases of litigation. Accordingly, each invocation of the Fifth Amendment should be examined and assessed for its impact on a larger trial strategy.