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Expert Analysis

Drawing Fifth Amendment Adverse Inferences Against Corporate Defendants

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Almost a century ago, Justice Louis Brandeis recognized that "[s]ilence is often evidence of the most persuasive character." *Bilokumsky v. Tod*, 263 U.S. 149, 153 (1923). In civil litigation that overlaps with potential criminal conduct, that observation carries great weight: An individual's decision to remain silent by invoking her Fifth Amendment rights *can* be used as evidence against her. Cases against corporate defendants present an added wrinkle, because the privilege is typically asserted by a co-defendant or non-party, such as a current or former employee. The plaintiff may wish to use that invocation of Fifth Amendment rights to prove liability by drawing adverse inferences against the company, while the corporate defendant will naturally want to avoid any negative consequences of its agent's attempt to avoid criminal jeopardy.

Precisely this issue is being litigated right now in the *Waymo v. Uber* case, pending in the Northern District of California. In that case, the theft of trade secrets claim asserted by Google affiliate Waymo rests in part on 14,000 electronic files that Anthony Levandowski—a former Google employee subsequently hired by Uber—allegedly improperly downloaded before leaving Google. Levandowski took the Fifth at his deposition, and was then fired by Uber for his failure to testify.

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The parties actively dispute whether and to what extent those assertions should give rise to adverse inferences against Uber at the upcoming October 2017 trial.

Though the *Waymo* court has not yet ruled, this article summarizes the key principles courts generally apply in deciding whether to permit Fifth Amendment adverse inferences in civil suits against corporate defendants. To support drawing such adverse inferences, a plaintiff must satisfy three prerequisites. First, there must be independent evidence corroborating the inference. Second, the plaintiff must persuade the court to impute that inference to the corporate defendant. Third, the probative value of the inference must outweigh any unfair prejudice.

Corroboration

In *Baxter v. Palmigiano*, 425 U.S. 308, 320 (1976), the Supreme Court ruled that adverse inferences from a party's refusal to testify in civil litigation must be corroborated by independent supporting evidence. Subsequent case law has clarified that the corroboration requirement applies at both summary judgment and at trial, and can also be addressed by a motion in limine. Though courts have not established a clear-cut test for how much corroboration is required, the evidentiary threshold for corroborating evidence should logically be lower than the ultimate standard of proof.

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Otherwise, the inference itself would carry no weight, and would not really be evidence at all.

The corroboration requirement has practical implications for both plaintiffs and defendants. For plaintiff's counsel, failure to develop a robust evidentiary record can squander the dramatic impact of a defense witness taking the Fifth. Document discovery and deposition questions should be carefully tailored to maximize the chances for admissibility of an adverse inference. Timing is also important: A defense witness who exercises her Fifth Amendment rights early in a case can spur a favorable settlement. On the other hand, taking that same deposition later in the case, when the existing evidentiary record may better corroborate key questions, may help secure an adverse inference at trial.

For defense counsel, it is important to object to questions that are uncorroborated, dispute efforts to stretch the adverse inferences beyond the existing corroborating evidence, and advocate for a strict view of corroboration that requires proof as to each fact that plaintiff's counsel seeks to infer.

Imputing Adverse Inferences

Courts have struggled with whether and when to permit drawing an adverse inference against a corporate defendant based on an agent's refusal to testify. On the one hand, the refusal to testify is "evidence of the most persuasive character," and can be considered a vicarious admission by the corporation. At the same time, there is a risk—particularly where the witness is a co-defendant, alleged co-conspirator, or disgruntled former employee—that the witness may be invoking the privilege deliberately to harm the corporate defendant. See, e.g., *Brink's v. City of New York*, 717 F.2d 700, 708-10 (2d Cir. 1983); *Cerro Gordo Charity v. Fireman's Fund Am. Life Ins. Co.*, 819 F.2d 1471, 1480-82 (8th Cir. 1987); *Rosebud Sioux Tribe v. A & P Steel*, 733 F.2d 509, 521 (8th Cir. 1984); *RAD Servs. v. Aetna Cas. & Sur. Co.*, 808 F.2d 271, 274-76 (3d Cir. 1986).

Most federal courts addressing this issue employ the four-factor test established by the Second Circuit in *LiButti v. United States*, 107 F.3d 110 (2d Cir. 1997). The plaintiff in *LiButti* was the purported owner of a racehorse. She sued the federal government for enforcing a tax levy against the racehorse, which the government claimed was legally owned by plaintiff's father. When questioned about the horse's ownership, the father invoked the Fifth Amendment and refused to answer any questions.

> Unlike federal courts applying 'LiButti', New York state courts generally have been reluctant to draw an adverse inference against a defendant corporation based on its employees' invoking the Fifth Amendment.

On appeal, the Second Circuit held that the father's refusal to testify supported admissibility of an adverse inference against his daughter. Stressing that "the overarching concern is fundamentally whether the adverse inference is trustworthy under all of the circumstances and will advance the search for truth," the court enumerated four "non-exclusive factors" to "guide" trial courts. *LiButti*, 107 F.3d at 123-24. The four-factor analysis set forth in *LiButti* is the primary test applied by federal courts in determining whether a corporate defendant will bear the consequences of an individual's refusal to testify, regardless of whether that individual is a party or non-party witness, current or former employee, or an individual with some other relationship with the defendant. The four factors are as follows.

1. Nature of the relationship between the defendant and the witness. The *LiButti* test favors admissibility when the invoking witness is a current employee, who is unlikely to damage an ongoing employment relationship by giving false testimony or spuriously taking the Fifth. See *In re Polyurethane Foam Antitrust Litig. Direct Purchaser Class*, No. 1:10 MD 2196, 2015 WL 12747961, at *7 (N.D. Ohio March 6, 2015). Former employees present a more complicated situation. See *Coquina Invs. v. TD Bank, N.A.*, 760 F.3d 1300, 1311 (11th Cir. 2014); *S.E.C. v. Monterosso*, 746 F. Supp. 2d 1253, 1256 (S.D. Fla. 2010). Plaintiffs' counsel should seek to develop and emphasize facts that support continuing loyalty, such as long-standing corporate service, ongoing benefits, or a consulting agreement. Defense counsel might try to show that the employment ended abruptly or on negative terms.

LiButti also bears on whether an individual's refusal to testify may be used against an alleged co-conspirator. Generally, the more attenuated the relationship with the defendant, the less likely courts have been to

admit a co-conspirator's refusal to testify. See *In re Urethane Antitrust Litig.*, No. 04-1616, 2013 WL 100250, at *2 (D. Kan. Jan. 8, 2013); *United States v. Dist. Council of New York City*, 832 F. Supp. 644, 652 (S.D.N.Y. 1993); *Polyurethane*, 2015 WL 12747961, at *5.

2. Defendant's degree of control over the witness. Current employees are typically deemed within the control of an employer defendant. With respect to former employees and other witnesses, discovery can explore whether, for example, the defendant is paying the witness's legal fees, a former employee's severance or consulting agreement contains a cooperation clause, or there is a statutory or contractual indemnification relationship. See, e.g., *Coquina*, 760 F.3d at 1311; *RAD*, 808 F.2d at 276.

3. Alignment of interests of the defendant and the witness in the outcome of the litigation. Plaintiffs should try to establish an alignment of interests—for example, that both the witness and the company would benefit from a defense verdict. Such strategies are more likely to succeed where the witness is also a party, an alleged co-conspirator, or otherwise alleged to be intimately involved with the wrongdoing. See *State Farm Mut. Auto. Ins. Co. v. Abrams*, No. 96 C 6365, 2000 WL 574466, at *7 (N.D. Ill. 2000); *Monterosso*, 746 F. Supp. 2d at 1264. In contrast, defendants should develop facts illustrating that the former employee has no interest in the outcome of the litigation. See *Emerson v. Wembley USA*, 433 F. Supp. 2d 1200, 1212-13 (D. Colo. 2006).

4. Role of the witness in the litigation. The more central a witness is to the events underlying the lawsuit, the more likely a court will allow adverse inferences. See *Coquina*, 760 F.3d at 1311-12; *Cerro Gordo*, 819 F.2d at 1482. Courts likewise consider whether the witness is also a party. See *State Farm*, 2000 WL 574466, at *7. If the witness was an executive or officer at the time of the misconduct, the court is more likely to permit the adverse inference. See *Monterosso*, 746 F. Supp. 2d at 1264.

Unlike federal courts applying *LiButti*, New York state courts generally have been reluctant to draw an adverse inference against a defendant corporation based on its employees' invoking the Fifth Amendment. Thus, "where the privilege is asserted by a nonparty witness, no adverse inference may be drawn." Access *Capital v. DeCicco*, 752 N.Y.S.2d 658, 658 (1st Dep't 2002); see also *State of New York v. Markowitz*, 710 N.Y.S.2d 407, 415 (3d Dep't 2000). The rule, however, "is not inflexible," *Searle v. Cayuga Med. Ctr.*, 813 N.Y.S.2d 552, 555 (3d Dep't 2006), and exceptions may arise where a non-party witness is the defendant's alter ego, or "where other unique circumstances exist involving the conduct of a nonparty." *Carothers M.D. v. Progressive Ins. Co.*, 979 N.Y.S.2d 439, 449 (N.Y. App. Term 2013) (citing *LiButti*), aff'd, 51 N.Y.S.3d 551, 556 (2d Dep't 2017).

Prejudice

Finally, an adverse inference for invoking the Fifth Amendment is always subject to exclusion, under Federal Rule of Evidence 403 or its equivalents, if the probative value of the adverse inference is substantially outweighed by the danger of unfair prejudice. Recently, for example, the Second Circuit vacated a district court's jury instruction permitting an adverse inference to be drawn against a party that refused to testify at her deposition because the district court failed to conduct an analysis under Rule 403, and the party would have been unduly prejudiced by the adverse inferences. *Woods v. START Treatment & Recovery Ctrs.*, No. 16-1318 (2d Cir. 2017).

Conclusion

As soon as either party to a civil litigation believes that a witness may invoke the Fifth Amendment, counsel should begin planning for how to develop or defeat corroboration and support or oppose an adverse inference at summary judgment and at trial. Attorneys who focus strategically on the ultimate admissibility of a witness's invocation of the Fifth Amendment, and the adverse inferences a fact finder may draw, can gain a decisive edge in shaping the ultimate outcome of a dispute in their clients' favor.