

Criminal Considerations in Civil Cases

By Arthur G. Boylan

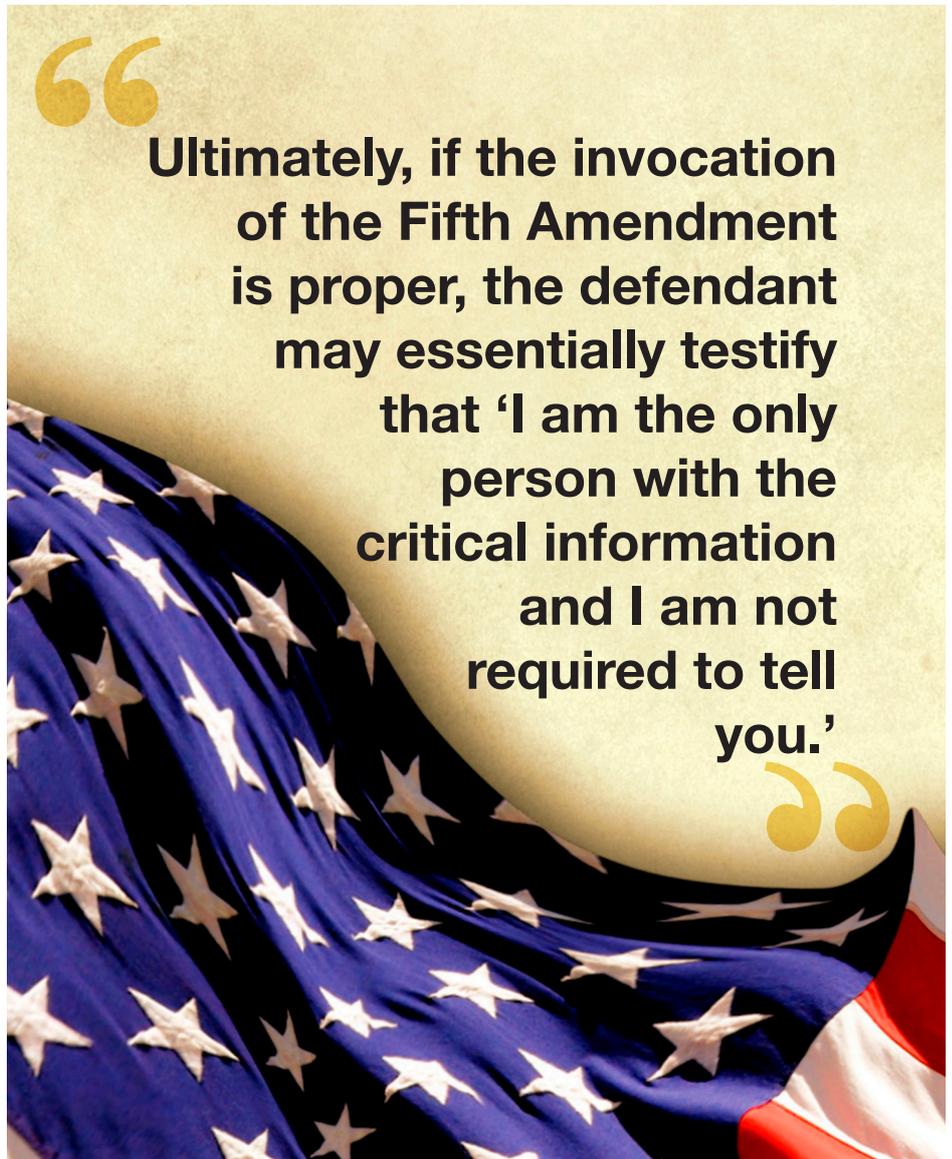
Plaintiffs frequently tell their attorneys that what the defendant has done is criminal. While such statements are merely hyperbole in most civil litigation, there are a surprising number of civil cases that include genuine criminal issues with all of the attendant procedural and substantive issues. Civil cases with criminal liability present issues for the plaintiff and defendant alike – but, with some forethought, it is possible to navigate those issues to your client’s benefit.

A Stay?

For the defendant’s counsel, there are a number of serious problems if civil proceedings and criminal proceedings are allowed to move forward at the same time. The broader discovery allowed on the civil side has the tendency to implicate issues relating to self-incrimination for a defendant simultaneously defending against a criminal proceedings. As a result, many courts have recognized the broad discretion of the courts to stay the civil proceedings during the pendency of parallel criminal proceedings. However, motions to stay can be very difficult to win and are highly fact specific. Among other things, courts must consider the amount of overlap between the cases, the status of the criminal proceeding, and the public interest in the outcome of both cases. The defendant’s ability to prevail on a motion to stay is even more challenging when the scope and status of the criminal proceedings are preliminary and uncertain. These are tough motions for a defendant to win, but the defendant’s counsel ought to consider a stay.

The Fifth?

When engaged in discovery in a case with potential criminal conduct, plaintiff’s attorneys should be aware that it is nearly inevitable that the defendant will attempt to invoke the Fifth Amendment. Some defense attorneys advise their clients to refuse to answer any questions whatsoever, even when there is only a whiff of criminal ac-



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cusations. But a defendant is not entitled to invoke the Fifth Amendment and also refuse to testify regarding his reasonable basis for fear of criminal prosecution. The invocation of the Fifth Amendment requires that “the claimant is confronted by substantial and ‘real,’ and not merely trifling or imaginary, hazards of incrimination.” *Marchetti v. United States*, 390 U.S. 39, 54 (1968).

Because the privilege against self-incrimination applies only in “instances where the witness has reasonable cause to apprehend

danger” of criminal liability, the witness must have a realistic basis for such a fear. *Hoffman v. United States*, 341 U.S. 479, 486 (1951), quoted in *United States v. Argomaniz*, 925 F.2d 1349 (11th Cir. 1991). If you are dealing with a defendant who refuses to answer basic questions about the existence of any criminal investigations or inquiries from law enforcement, make a record and seek an appropriate remedy for the improper invocation of the Fifth Amendment – which may include a motion to compel, a motion for sanctions or an ad-

verse inference at trial. Without testimony or other evidence confirming the potential for criminal charges, the defendant has not established a basis for invoking the Fifth. In the event that there is publicly available information regarding the status of criminal proceedings or the lack of criminal proceedings, well prepared counsel will develop questions based on that information to demonstrate that the invocation of the Fifth Amendment on particular questions is improper.

The Perfect Crime?

Ultimately, if the invocation of the Fifth Amendment is proper, the defendant may essentially testify that “I am the only person with the critical information and I am not required to tell you.” Frankly, in response to this tactic, the ability to move to compel or move for sanctions is not very satisfying.

So, does a defendant in a civil case who invokes the Fifth Amendment get away with the perfect crime? In the civil context, the invocation of the Fifth Amendment will often have more draconian consequences for the defendant. Certainly, there is the

availability of an adverse inference at trial. However, even at the summary judgment phase, case law is clear that the court may draw an adverse inference from the defendant’s invocation of the Fifth Amendment. *Faegre & Benson, LLP v. Purdy*, 447 F. Supp. 2d 1008, 1018 (D. Minn. 2006). (granting summary judgment against defendant based on adverse inference and other undisputed evidence); *Parker v. Hennepin County Dist. Court*, Fourth Judicial Dist., 285 N.W.2d 81, 83 (Minn. 1979) (noting that courts have entered judgment against civil defendants who refused to answer discovery on Fifth Amendment grounds).

Granted, an adverse inference cannot be the sole basis for summary judgment, but the adverse inference can support summary judgment when combined with other corroborating evidence. See, e.g., *Faegre & Benson*, 447 F. Supp. 2d at 1018. Again, if counsel properly prepares for the defendant’s invocation of the Fifth Amendment and develops corroborating evidence from other sources, the plaintiff can later move for summary judgment and ruin the defendant’s attempt at the perfect crime.

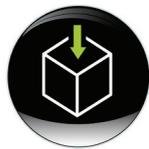
From time to time, it may turn out that your client is correct and the defendant’s actions are criminal. The savvy civil litiga-

tor will plan for the potential invocation of the Fifth Amendment and work to turn the criminal aspect in your client’s favor.

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