

Pleading the Fifth in Federal Civil Litigation in Kentucky

The Key Distinctions that Exist Between the Application of State Versus Federal Substantive Law

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As all lawyers (and non-lawyers, for that matter) likely are well aware, invoking the Fifth Amendment is commonplace in criminal matters. Though less so in the civil context, the Fifth Amendment's privilege against self-incrimination does still apply. And when it is raised by a witness in a civil proceeding, the consequences are markedly different depending on whether the action is governed by state or federal law. Federal practitioners should be aware of these key differences and their effects.

Aside from providing certain due process protections, requiring compensation for the taking of property for public use and prohibiting "double jeopardy," the Fifth Amendment to the United States Constitution is best known for its protection of individuals from being forced to incriminate themselves. One hundred years ago this year, the United States Supreme Court made clear that the Amendment "applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it." And as the Sixth Circuit and other courts have repeatedly reaffirmed, this protection afforded

by the Fifth Amendment is quite broad and may be "properly invoked so long as a person has reasonable cause to apprehend a real danger of incrimination" — *i.e.*, something more than "a mere imaginary, remote, or speculative possibility of prosecution."

So, what happens when a witness pleads the Fifth in a civil proceeding? The answer (not unlike most answers to legal questions) is "it depends." And in this instance, what that answer depends on is whether the matter is governed by state or federal law.

On the federal side of things, in its 1976 decision in *Baxter v. Palmigiano*, the U.S. Supreme Court established that federal courts may impose an adverse inference against parties to a civil action who refuse to testify based on the Fifth Amendment. Federal courts in Kentucky and elsewhere in the Sixth Circuit have since interpreted that ruling to allow, but not necessarily mandate, such adverse inferences, the key factor being the existence and availability of other evidence relating to the facts about which the party refuses to answer. So, at least under federal law, a party's

invocation of the Fifth Amendment can have significant consequences, particularly where the party refuses to testify about a key fact or element at issue.

Still, federal practitioners should be aware that this federal law approach may not apply simply because a case is pending in federal court. Rather, whether parties may face a potential adverse inference for their assertion of privilege and refusal to testify turns significantly on whether the federal court's jurisdiction is based on a federal question under 28 U.S.C. § 1331 or on diversity of citizenship under 28 U.S.C. § 1332. This is because, under the *Erie* doctrine, federal courts exercising diversity jurisdiction apply federal procedural law but must follow the substantive law of the forum state. To that end, Federal Rule of Evidence 501 provides that state law governs privilege issues in civil cases. (Of note, the Advisory Committee's notes to Rule 501 further confirm the rationale that federal common law should not supersede substantive state law on privilege.)

Kentucky law diverges significantly from

federal law on the consequences of invoking a privilege in civil litigation. In contrast to the federal common law rule outlined above (and the similar approach taken by a number of other jurisdictions), Kentucky has enacted an evidentiary rule expressly prohibiting the drawing of any inference against a party who has invoked his or her the Fifth Amendment privilege. Indeed, that rule, Kentucky Rule of Evidence 511, not only precludes the imposition of a negative inference, but goes so far as to prohibit any "comment by judge or counsel" about the claimed privilege, and even requires an instruction that no adverse inference may be drawn, if a party requests it. The rationale behind this rule seems to be that if a comment could be made or an adverse inference drawn by a party's exercise of a privilege, that party would be pressured not to invoke (or to waive) the privilege afforded it, thereby effectively negating the whole point of the privilege's existence. So, while it likely still would be fair game for counsel to point out that certain evidence or testimony is uncontroverted, even the

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eliciting of a claim of privilege in open court arguably would violate this rule, especially if counsel did so knowing that such privilege would be asserted in response to a particular line of questioning.

Consequently, in Kentucky federal courts, the answer to “what happens when a witness pleads the Fifth in a civil proceeding?” turns drastically on whether Kentucky or federal substantive law applies. In a civil action where subject matter jurisdiction is based on a federal question under § 1331, federal law would apply and may allow an adverse inference against a party who invokes the Fifth Amendment privilege and refuses to testify on that basis. However, in a civil case where subject matter jurisdiction is founded on diversity under § 1332, no such inference may be drawn or imposed, nor the privilege or its invocation commented upon. Thus, where federal law applies and an opposing party refuses to answer by pleading the Fifth, a potentially devastating mechanism exists for obtaining an adverse inference about the substance of that party’s testimony. On the other hand, in

federal civil actions applying Kentucky law, an equally powerful tool exists for preventing the drawing of negative inferences against a party who properly invokes its Fifth Amendment privilege against self-incrimination. Though this issue may not arise every day or in every case, when it does or has the potential to come up, federal practitioners would do well to inform themselves of the varying effects and consequences that may attend a party’s invocation of the Fifth Amendment in civil litigation.

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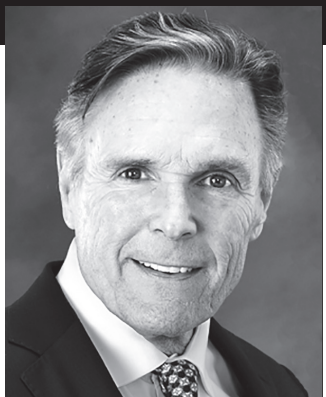
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